# RECORD, CASE NO. 15252.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1893.

### TERM NO., 883.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

W. G. BRIMSON, J. S. KEEFE, AND W. R. STIRLING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, in chancery, sitting at the United States court room, in the city of Chicago, in said district, before the Hon. Walter Q. Gresham, circuit judge of the seventh judicial circuit, on Wednesday, the seventh day of December, in the October adjourned term of said court, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the one hundred and seventeenth year.—S. W. Burnham, clerk.

913. 22,531. In the matter of the application of the Interstate Commerce Commission for an order to compel W. G. Brimson, J. S. Keefe, and W. R. Stirling to produce books and papers and answer certain questions.

Be it remembered that on this day, to wit, the fifteenth day of July, in the year eighteen hundred and ninety-two, came Thomas E. Milchrist, United States district attorney, who filed in the clerk's office of said court the petition of the Interstate Commerce Commission, which said petition is in the words and figures following, to wit:

2 In the circuit court of the United States for the northern district of Illinois, northern division.

IN THE MATTER OF THE COMPLAINT OF THE Interstate Commerce Commission
*against the*
CALUMET & BLUE ISLAND RAILWAY COMPANY and others.

*To the circuit court of the United States of America for the northern district of Illinois, northern division.*

The Interstate Commerce Commission of the United States of America, a commission duly organized and existing as such under and by virtue of an act of Congress of the said United States, entitled "An act to regulate commerce," approved February 4th, 1887, as amended by act approved March 2, 1889, and act approved February 10th, 1891, respectfully represents that on the 14th day of June, A. D. 1892, the said Interstate Commerce Commission, in pursuance of a complaint made to said Commission that the Illinois Steel Company, a corporation created and existing under and by virtue of the laws of the State of Illinois, had caused to be incorporated under the laws of the State of Illinois the Calumet & Blue Island Railway Company for the purpose of operating its switches and side tracks at South Chicago, and engaging in the traffic by continuous ship-
3 ment from cities and places without the State of Illinois, to cities and places within the State of Illinois, in connection with the Baltimore & Ohio Railroad Company, and other railroads.

That said Illinois Steel Company had also caused to be incorporated the Chicago & Southeastern Railway Company under the laws of the State of Illinois, for the purpose of operating its switches and side tracks at Chicago, in the State of Illinois, and engaging in traffic by continuous shipment from cities and places without the State of Illinois to cities and

places within the State of Illinois, and in connection with the Chicago and Alton Railroad Company and the Chicago Railway Transfer Company.

And that the said Illinois Steel Company had also caused to be incorporated the Joliet & Blue Island Railway Company under the laws of the State of Illinois, for the purpose of operating its switches and side tracks at Joliet, Illinois, and engaging in traffic by continuous shipment from cities and places without the State of Illinois to cities and places within the State of Illinois, in connection with the Chicago and Alton Railroad Company and other railroads and railways.

And that the said Illinois Steel Company had also caused to be incorporated the Chicago and Kenosha Railway Company, for the purpose of operating its switches and side tracks at Chicago aforesaid, and engaging in traffic by continuous shipment from cities and places without the State of Illinois to cities and places within the State of Illinois, in connection with the Chicago and Northwestern Railway Company and other railway companies.

4 And that said Illinois Steel Company had also caused to be incorporated, under the laws of the State of Wisconsin, the Milwaukee, Bay View & Chicago Railroad Company, for the purpose of operating its switches and side tracks at or near Milwaukee, in the State of Wisconsin, and engaging in traffic by continuous shipment from cities and places without the State of Wisconsin to cities and places within the State of Wisconsin, in connection with the Chicago, Milwaukee & St. Paul Railway Company, and other railways.

And that it was represented by said complaint that the Illinois Steel Company was the owner of and had control of the said Calumet & Blue Island Railway Company, the Chicago and Southeastern Railway Company, the Joliet & Blue Island Railway Company, the Chicago and Kenoshe Railway Company, and the Milwaukee, Bay View and Chicago Railroad Company, and are operating the same in connection with the railroads of the other railroad companies above mentioned as a device for the purpose of evading the provisions of the act of Congress to regulate commerce, and to obtain special, illegal, unjust, and unreasonable rates for the transportation of interstate traffic, and were operating said Chicago and Southeastern Railway Company, the Calumet and Blue Island Railway Company, the Chicago and Kenosha Railway Company, the Joliet and Blue Island Railway Company, and the Milwaukee, Bay View and Chicago Railroad Company, by the connivance and consent of said other connecting railroads and railway companies in such a man-

5 ner as to give to the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, and subject other persons, firms, companies, and corporations to undue and unreasonable prejudice and discrimination as to the transportation of property from divers cities and places without the State of Illinois and the State of Wisconsin to divers cities and towns within the said States of Illinois and Wisconsin.

And that said railroad and railway companies so alleged to be operated, controlled, and owned by the said Illinois Steel Company for more than six months prior to such complaint had been, were, and still are engaged in the transportation of property by railroad, in connection with other companies above mentioned, under the common control, management, and arrangement for the continuous carriage or shipment from

divers cities and towns without the States of Illinois and Wisconsin to divers cities and places within those States and between those States, and that none of the said railroad companies so owned, controlled, and operated by the said Illinois Steel Company or alleged to be owned, controlled, and operated by the Illinois Steel Company, had filed copies of their contracts, agreements, and arrangements with the said other companies, nor filed with the Insterstate Commerce Commission tariffs, schedules of their rates, fares, and charges for the transportation of interstate business, as required by law.

And the said Interstate Commerce Commission further represents
6 to the court that on the 14th day of June, A. D. 1892, said Commission, of its own motion, decided to investigate the said informal complaint as by law it was required and had authority to do, by inquiring into the business of all said railroad and railway companies so owned, controlled, and operated by the Illinois Steel Company, and also said other railroad companies operated in connection therewith, and the management thereof by all of such carriers, both those so owned, controlled, and operated by the Illinois Steel Company, those so alleged to be owned, controlled, and operated by the Illinois Steel Company, and all other railroad companies operated in connection therewith, and the management thereof by all such carriers with reference to the alleged making of illegal, unjust, and unreasonable rates, and also as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, as well as the failure on the part of said carriers, or either of them, to file their contracts, agreements, or tariffs, as required by law.

And that on the said 14th day of June, A. D. 1892, said Interstate Commerce Commission entered an order at its principal office in the city of Washington, under the seal of said commission, with a concise statement of said complaint thereto attached, directing and ordering that—

"That the Calumet & Blue Island Railway Company, the Chicago & Southeastern Railway Company, the Joliet & Blue Island Railway Company, the Chicago & Kenosha Railway Company, the Milwaukee, Bay View & Chicago Railroad Company, the Baltimore & Ohio Rail-
7 road Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburgh, Fort Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company of Chicago, the Chicago & Alton Railway Company, the Chicago Railway Transfer Company, the Atchison, Topeka and Santa Fe Railroad Company, the Elgin, Joliet & Eastern Railway Company, the Chicago & Northwestern Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company on or before the 7th day of July, A. D. 1892, do severally make and file with the Interstate Commerce Commission, at its office in Washington, in the District of Columbia, a full, complete, perfect, and specific verified answer setting forth all and singular the facts and circumstances in regard to the matters and things thereof complained against them as herein set forth, and particularly the said railroad companies are required to state and make known in their said answers as follows:

1. Does any traffic contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the con-

trol and operated by the said Illinois Steel Company, and any of the other companies with reference to interstate traffic? If so, state the contract agreement or arrangement.

2. Or any tariffs of rates and charges for the transportation of
8 interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carriers?

3. Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company, other than the Illinois Steel Company, and if so, to what amount?

And it is also hereby further ordered that all of said companies appear before the said Interstate Commerce Commission, at the office of the United States attorney, in the United States post-office building, at Chicago, at 10 o'clock, on Wednesday, the 13th day of July A. D. 1892, when the said Interstate Commerce Commission will proceed to make inquiry, investigate into the management of the business aforesaid by the carriers aforesaid.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Interstate Commerce Commission at the city of Washington, in the District of Columbia, on this 14th day of June, 1892."

[SEAL.] EDWARD A. MOSELY,

*Secretary of the Interstate Commerce Commission thereunto duly authorized.*

9 Which order, together the copies of said informal complaint was duly served upon each of said railroad and railway companies and common carriers before the 13th day of July, A. D. 1892. A copy of which order is hereto attached and marked Exhibit A.

And that afterwards on the 13th day of July, A. D. 1892, the said Calumet & Blue Island Railway Company, the said Chicago and Southeastern Railway Company, the Joliet & Blue Island Railway Company, and the Chicago and Kenosha Railway Company, filed with said Commission, their several and respective answers averring among other things, that each of said railways were duly organized as railroad corporations under and by virtue of the laws of the State of Illinois; that they had in all respects complied with the obligations imposed upon them by the laws of the State as well as the United States; that they were not engaged in interstate traffic within six months preceding the filing of the complaint herein; that it answers no to each of the questions specifically propounded to it as set forth in the summons heretofore served upon it." And that the said Calumet & Blue Island Railway Company also averred in its said answer that it had not during the six months preceding the filing of the complaint received or delivered interstate traffic or such other common carriers named in said summons or order during said time, for any person, firm, or company, and denying that the operation of its railways is a device to evade the provisions of the interstate-com-
10 merce law and denies that such operation has resulted in obtaining for the Illinois Steel Company special, illegal, unjust, or unreason-

able rates for the transportation of interstate traffic, or that such operation has resulted in securing to the Illinois Steel Company the transportation of such interstate traffic any illegal, undue, or unreasonable preferences whatever. A copy of which said several answers is hereto attached, and marked Exhibits B, D, E, F.

And that the Milwaukee, Bay View and Chicago Railroad Company, on the said 13th day of July, A. D. 1892, also filed its answer with the said Commission, averring, among other things, that it was organized as a railroad under the laws of the State of Wisconsin, that it had in all respects complied with the obligations imposed upon it by the laws of that State, as well as of the United States; that it had not engaged in interstate traffic within the six months preceding the filing of the complaint herein, and that it answered "No" to each of the three questions specifically propounded and set forth in said summons or order. A copy of which said answer is hereto attached, marked Exhibit C.

And said Interstate Commerce Commission further represent to your honor that, after the filing of said answers and consideration of the same, the said Commission believed it to be its duty to investigate the matters complained of by the examination of witnesses and the books and papers of the said several corporations, and especially as to whether or not the Illinois Steel Company was the owner in fact of the said five rail-

11 ways, or either of them, and as to whether or not the incorporation of said companies was for the purpose of giving to the said Illinois Steel Company an undue and illegal preference in the transportation of its property and freight; on the said 13th day of July, A. D. 1892, in pursuance of said order, the said Commission convened in the Federal court room, in the Government building at Chicago, to hear the testimony of certain witnesses duly subpœnaed, touching the charges made in said complaint, and the issues made by the said complaint, and the said several answers, and thereupon one William B. Brimson, a witness duly subpœnaed and sworn to testify before said Commission as to his knowledge of the matters in controversy, answering, says: "I am the president and general manager of these five railroads."

Question by Commissioner VEAZEY, a member of said Commission:

Q. Mr. Keefe is your secretary and auditor?

A. Yes, sir; he is secretary and auditor.

Q. What constitutes the principal traffic of these several roads?

A. The business of these roads, except as indicated in the answers, is that of switching—switching business. We do a switching and terminal business, in that we are open to any business, for any body's property, or persons who may locate at such place where we can go to them; mainly our business is with the Illinois Steel Company. This is the great proportion of our business.

* * * * * * *

12 Q. You do not engage in transportation business, other than what you have stated?

A. Except the Calumet & Blue Island, as indicated in our reply. On that we do engage in other business to a certain extent.

Q. Do you engage in the transportation business for everybody and anybody who has occasion to employ you?

A. No.

Q. It is limited to these companies with which you have made this traffic arrangement?

A. Yes, sir.

* * * * * * *

Q. Are these companies—these railroads—owned by the Illinois Steel Company?

(Question objected to by counsel for said railroads.)

(The attorney for the railroad companies advised the witness not to answer, and stated to the Commission that their reason for so advising the witness was that the question and answer thereto would be immaterial and irrelevant.)

Commissioner VEAZEY. Do you refuse to answer the question?

Mr. BRIMSON——

A. I shall be compelled to follow the advice of counsel.

Commissioner VEAZEY. And you do this in the light of what the provisions of the statute are in this matter.

(To which statement the witness, Brimson, persisted in his refusal to answer.)

The said Commission therefore report to the court that the said witness, W. B. Brimson, refuses to answer a material question propounded to him by said Commission.

13 And the said Commission further represent and report, that in the further examination of the said matter, one J. S. Keefe was called as a witness, and being duly sworn, testified as follows:

Ques. by Commissioner McDILL:

Q. What position do you occupy?

A. Secretary and auditor of the five roads mentioned.

Q. How long have you acted as secretary and auditor?

A. Since the 27th day of January, 1891.

Q. Do your books show the names of the stockholders of the Illinois Steel Company?

A. No, sir; they do not.

Q. Have you in your possession any book that shows the names of the stockholders of the Illinois Steel Company?

A. I have not.

Q. I don't mean the Illinois Steel Company. I mean the Calumet & Blue Island Railway Company.

A. Yes, sir.

Q. You have that?

A. Yes, sir.

Q. Will you produce it?

A. ——

(Mr. Hutchins, counsel for the railroads, objects to the witness answering the question.)

Commissioner McDILL. The book called for is the book which shows the stock and the names of the stockholders.

Mr. HUTCHINS (counsel for the railroads). We decline to produce it.

14 Commissioner McDILL. Q. Do you know as a matter of fact whether the Illinois Steel Company owns the greater part of all of the stock of these several railroads?

Mr. HUTCHINS. We object to that.

Commissioner McDILL (to witness). Do you refuse to answer?

WITNESS. On the advice of counsel, I refuse to answer.

The said Commission, therefore, report to the court, that the said witness, J. S. Keefe, refused to answer a material questions propounded to him by said Commission.

And the said Commission further report, that in the further examination of the said matter, one William R. Stirling, was called as a witness, and being duly sworn, testified as follows:

Commissioner VEAZEY. Q. What is your official relation to the Illinois Steel Company?

A. First vice-president.

Q. What relation exists between your company and these five railroads that have been talked about?

A. ——

Mr. HUTCHINS. We object to that, so far as it may relate to the ownership of the stock of the company.

Q. Do you decline to answer that question?

Mr. WILSON. We advise the witness not to answer the question, so far as it may relate to the ownership of this stock if there is any such relation, subject to that we have no objection.

A. I am not the secretary. The Illinois Steel Company has a contract with the five railroads in question, to handle the railroad business at the five plants of the steel company.

Q. Is that the only relation which your company sustains to these railroad companies?

15 A. By the advice of counsel I decline to answer.

The said Commission therefore report to the court that the said witness, William R. Stirling, refuses to answer material questions propounded to him by said Commission.

The Commission further reports to the court, that afterwards, on the 14th day of July, A. D. 1892, said Commission issued a subpœna duces tecum directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before said Commission forthwith, and bring with him the stock books of the said five railroads, which said subpœna duces tecum was duly served upon said J. S. Keefe, by reading the same to him and delivering to him a true copy of the same, a copy of which subpœna is hereto attached, marked Exhibit G.

And the said Commission also then and there issued a subpœna duces tecum directed to William R. Stirling, as first vice-president of said Illinois Steel Company, commanding him to produce forthwith before said Commission the stock books of the said Illinois Steel Company, which said subpœna was duly served upon said Stirling by reading the same to him and delivering a true copy to him, a copy of which said subpœna is hereto attached, and marked Exhibit N.

That afterwards, on the same day, said Keefe and said Stirling, in answer to said supœnas, appeared before said Commission, and then and there declined and refused to produce said books or either of them, as commanded by said subpœnas duces tecum, and do still persist in such refusal.

16 The said Commission, therefore, prays for an order requiring and commanding the said W. B. Brimson, the said J. S. Keefe, and the

said W. R. Stirling to appear before said commission and answer the said several questions propounded to them by said Commission which they have so declined to answer.

And the said Commission further prays for an order of this honorable court requiring and commanding said J. S. Keefe to appear before s'id Commission and produce to this Commission the said stock books of the said five railroads which he, the said J. S. Keefe, has so declined to produce.

And for an order requiring and commanding said W. R. Stirling to appear before said Commission and produce to this Commission the said stock books of the said Illinois Steel Company which he, the said W. R. Stirling, has so declined to produce.

THE INTERSTATE COMMERCE COMMISSION,
By WHEELOCK G. VEAZY,
JAMES W. MCDILL,
JUDSON C. CLEMENTS,
*Commissioners.*

THOMAS E. MILCHRIST,
*U. S. Atty.*

17 EXHIBIT A.

At a general session of the Interstate Commerce Commission, held at its offices in the City of Washington, D. C., on the 14th day of June, A. D. 1892:

Present, Hon. William R. Morrisor, Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, commissioners.

Whereas informal complaint has been made to the Interstate Commerce Commission tha' the Illinois Steel Company, a corporation created, chartered, and existing under and by virtue of the laws of the State of Illinois, has caused to be incorporated under the laws of the State of Illinois, the Calumet & Blue Island Railway Company for the purpose of operating its switches and side tracks at South Chicago, in the State of Illinois, and engaging in traffic by a continuous shipment from cities and places without the State of Illinois to cities and places within the State of Illinois, in connection with the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburgh,
18 Fort Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, and the Belt Railway Company of Chicago, and has also caused to be incorporated the Chicago & Southeastern Railway Company (of Illinois) under the laws of the State of Illinois for the purpose of operating its switches and side tracks at Chicago, in the State of Illinois, and engaging in traffic by a continuous shipment from cities and places without the State of Illinois to cities and places within the State of Illinois, in connection with the Chicago & Alton Railroad Company and the Chicago Railway Transfer Company, and has also caused to be incorporated the Joliet & Blue Island Railway Company under the laws of the State of Illinois, for the purpose of operating its switches and side tracks at Joliet, Illinois, and engaging in traffic by a

continuous shipment from cities and places without the State of Illinois to cities and places within the State of Illinois, in connection with the Chicago & Alton Railroad Company, the Atchison, Topeka & Santa Fe Railway Company, the Elgin, Joliet & Ea'tern Railway Company, and the Chicago, Rock Island & Pacific Railway Company, and has also caused to be incorporated under the laws of the State of Illinois, the Chicago & Kenosha Railway Company for the purpose of operating its switches and side tracks at Chicago aforesaid and engaging in traffic by a continuous shipment from cities and places without the State of Illinois, to cities and places within the State of Illinois, in connection with the Chicago & Northwestern Railway Company, and the Chicago, Mil-
19 waukee & St. Paul Railway Company, and has also caused to be incorporated under the laws of the State of Wisconsin, the Milwaukee, Bay View & Chicago Railroad Company, for the purpose of operating its switches and side tracks at or near Milwaukee, in the State of Wisconsin, and engaging in traffic by a continuous shipment from cities and places without the State of Wisconsin, to cities and places within the State of Wisconsin, in connection with the said Chicago, Milwaukee & St. Paul Railway Company, and the Chicago & Northwestern Railway Company.

And whereas it is stated in said informal complaint that the said Illinois Steel Company owns and controls certain of the above-named companies, to wit, the Calumet & Blue Island Railway Company, the Chicago & Southeastern Railway Company, the Joliet & Blue Island Railway Company, the Chicago & Kenosha Railway Company, the Milwaukee, Bay View & Chicago Railroad Company, and operates the same in connection with the railroads of the other railroad companies hereinabove named, as a device for the purpose of evading the provisions of the act to regulate commerce, and obtaining special, illegal, unjust and unreasonable rates for the transportation of interstate traffic, and operates the same by the connivance and consent of said other connecting railroad companies in such a manner as to give to the said Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, and subjecting other persons, firms, and companies to undue and unreasonable preju-
dice and disadvantage as to the transportation of property from
20 divers cities and places without the States of Illinois and Wisconsin to divers cities and towns within those States and between those States.

And whereas it has been made to appear that the said railroad companies so owned, controlled, and operated by the said Illinois Steel Company for more than six months last past, have been and still are engaged in the transportation of property by railroad in connection with the other companies above named, under a common control, management, or arrangement for a continuous carriage or shipment from divers cities and towns without the States of Illinois and Wisconsin, to divers cities and places within those States and between those States, and it appearing that none of the said railroad companies so owned, controlled and operated by the Illinois Steel Company have filed copies of their contracts, agreements, and common arrangements with the said other companies, nor have they filed with the Interstate Commerce Commission tariffs or schedules of their rates, fares, and charges for the transportation of interstate business as required by the 6th section of the act to regulate commerce.

And whereas the Interstate Commerce Commission of its motion, has decided to investigate the said informal complaint by inquiring into the business of all said railroad companies, both those so owned, controlled, and operated by the Illinois Steel Company, and also said other railroad companies operated in connection therewith, and the management thereof by all of such carriers with reference to the alleged making of illegal, unjust and unreasonable special rates, and also as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, as well as the failure on the part of said carriers to file their contracts, agreements, or tariffs as required by law.

21

Therefore, it is hereby ordered that the Calumet & Blue Island Railroad Company, the Chicago & Southeastern Railway Company, the Joliet & Blue Island Railway Company, the Chicago & Kenosha Railway Company, the Milwaukee, Bay View & Chicago Railroad Company, the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburgh, Fort Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company, of Chicago; the Chicago & Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka & Santa Fe Railroad Company, the Elgin, Joliet & Eastern Railway Company, the Chicago & Northwestern Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, on or before the 7th day of July, A. D. 1892, do severally make and file with the secretary of the Interstate Commerce Commission, at its office in Washington, in the District of Columbia, a full, complete, perfect, and specific verified answer, setting forth all and singular the facts and circumstances in regard to the matters and things thereof complained against them as hereinbefore set forth, and particularly the said railroad companies are required to state and make known in their said answers as follows:

22

1. Does any contract, agreement in writing or otherwise exist between the companies above alleged to be under the control of and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement.

2. Are any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carriers?

3. Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm or company, other than the Illinois Steel Company, and if so, to what amount?

And it is also hereby further ordered, that all of said companies appear before the Interstate Commerce Commission, at the office of the United States attorney, in the United States post-office building in Chicago, afore-

said, at 10 o'clock in the forenoon on Wednesday, the 13th day of July A. D. 1892, when the said Interstate Commerce Commission will
23 proceed to make inquiry and investigate into the management of the business aforesaid by the carriers aforesaid.

In testimony whereof I have hereto set my hand and affixed the seal of the Interstate Commerce Commission at the city of Washington, in the District of Columbia, on this 14th day of June, 1892.

[SEAL.] EDWARD A. MOSELY,
*Secretary of the Interstate Commerce Commission,*
*thereunto duly authorized.*

24 EXHIBIT B.

Interstate Commerce Commission. In the matter of the complaint against the Calumet & Blue Island Railway Company and others.

*Answer of the Calumet & Blue Island Railway Company.*

This respondent avers that it is duly organized as a railroad corporation under and by virtue of the provisions of chapter 114 of the revised statutes of the State of Illinois, and it avers that it is authorized as such to carry on the business of the transportation of persons and property.

That it has not engaged in interstate traffic within the six month preceding the filing of the complaint herein.

That no traffic agreement or arrangement in writing or otherwise exists between it and any of the other companies referred to in interrogatory one in the summons served upon this respondent with reference to interstate traffic, except as hereinafte' set forth.

That no tariff of rates and charges for the transportation of interstate property is in effect between it and said last mentioned railroad companies except as hereinafter set forth.

That it has not, during the six months preceding the filing of the
25 said complaint, received or delivered interstate traffic from such other carriers named in said summons during said time for any person, firm, or company.

Further answering, this respondent says that on June 13th, 1892, it united with the Pennsylvania Railroad Company in supplement No. 69 to coke tariff No. 45, to take effect June 18th, 1892, which said tariff, as this respondent is informed and believes, has been duly filed in the office of the Interstate Commerce Commission and duly posted, as required by law.

That by said supplement the through rate on coke in carloads from points on the Southwest Pennsylvania Railroad and Youghiogheny Northern Railroad to Joliet, via South Chicago, routed by the railway of this respondent from Chicago to Joliet, is two dollars and seventy-five cents ($2.75) per net ton, of which through rate, by arrangement between the carriers in interest, this respondent receives the sum of forty cents (40 c.) per net ton; that such sum of forty cents is now and for years past has been the proportion of the through rate allowed to other carriers for transportation of coke between Chicago and Joliet, and that the same is a reasonable allowance therefor.

That this respondent has been engaged, as it lawfully may, in the transportation of coke under the said supplemental tariff, and that it is entitled to and will receive as its proportion of such through rate the said sum of forty cents per net ton.

Further answering, this respondent says that on July 6th, 1892, it united with the Lake Shore & Michigan Southern Railway and Pittsburgh
26 & Lake Erie Railroad in supplement No. 4 to joint coke tariff No. B, 16, to take effect July 7th, 1892, which said tariff, as this respondent is informed and believes, has been duly filed in the office of the Interstate Commerce Commission and duly posted as required by law.

That by said supplement the through rate on coke in carloads of twenty-four thousand pounds and over from the Connelsville Coke district to Joliet, Illinois, routed by the railway of this respondent from Chicago to Joliet, is two dollars and seventy-five cents ($2.75) per net ton, of which through rate by arrangement with the carriers in interest this respondent receives the sum of forty cents (40 c.) per net ton; that such sum of forty cents is now and for years past has been the proportion of the through rate allowed to other carriers for the transportation of coke between Chicago and Joliet, and that the same is a reasonable allowance therefor.

That this respondent will engage, as it lawfully may, in the transportation of coke under the said last mentioned supplemental tariff, and that it is entitled to and will receive as its proportion of such through rate the sum of forty cents per net ton.

Further answering, this respondent denies that the operation of its railway is a device to evade the provisions of the act to regulate commerce, and denies that such operation has resulted in obtaining for the Illinois Steel Company special illegal, unjust, or unreasonable rates for the transportation of interstate traffic, or that such operation has resulted in
27 securing to the said Illinois Steel Company in the transportation of such interstate traffic, any illegal, undue, or unreasonable preference or advantage whatsoever.

And this respondent further answering says that it has not neglected to file with the Interstate Commerce Commission copies of any agreements or tariffs as required by the provisions of the said act to regulate commerce.

And this respondent prays that the complaint against it be dismissed.

CALUMET & BLUE ISLAND RAILWAY COMPANY,
By W. G. BRIMSON, *President.*

STATE OF ILLINOIS,
*County of Cook, ss:*

W. G. Brimson, being duly sworn, deposes and says that he is the president of the above-named Calumet & Blue Island Railway Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true, as he verily believes.

W. G. BRIMSON.

Subscribed and sworn to before me this 13th day of July, A. D. 1892.
[SEAL.] A. M. CROSS,
*Notary Public.*

Prussing, Hutchins & Goodrich, attorneys for respondent. C. S. Holt, J. P. Wilson, Lyman Trumbull, of counsel.

28 EXHIBIT C.

Interstate Commerce Commission. In the matter of the complaint against the Calumet & Blue Island Railway Company and others.

*The answer of the Milwaukee, Bay View & Chicago Railroad Company.*

This respondent avers that it is duly organized as a railroad corporation under and by virtue of the laws of the State of Wisconsin, and that it is authorized as such to engage in the business of the transportation of persons and property.

That it has in all respects complied with the obligations imposed upon it by the laws of the State of Wisconsin as well as by the laws of the United States.

That it has not engaged in interstate traffic within the six months preceding the filing of the complaint herein.

That it answers no to each of the three questions specifically propounded to it and set forth in the summons heretofore served upon it.

And this respondent prays that the complaint against it be dismissed.

MILWAUKEE, BAY VIEW & CHICAGO RAILWAY COMPANY,
By W. G. BRIMSON, *President.*

29 STATE OF ILLINOIS,
*County of Cook, ss:*

W. G. Brimson, being duly sworn, deposes and says that he is the president of the above-named Milwaukee, Bay View & Chicago Railroad Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true, as he verily believes.

W. G. BRIMSON.

Subscribed and sworn to before me this 13th day of July, A. D. 1892.
[SEAL.] A. M. CROSS,
*Notary Public.*

Prussing, Hutchins & Goodrich, attorneys for respondent. C. S. Holt, J. P. Wilson, Lyman Trumbull, of counsel.

30 EXHIBIT D.

Interstate Commerce Commission. In the matter of the complaint against the Calumet & Blue Island Railway Company and others.

*The answer of the Chicago & Kenosha Railway Company.*

This respondent avers that it is duly organized as a railroad corporation under and by virtue of the provisions of chapter 114 of the Revised Statutes of the State of Illinois, and it avers that it is authorized as such to engage in the business of the transportation of persons and property.

That it has in all respects complied with the obligations imposed upon it by the laws of the State of Illinois as well as by the laws of the United States.

That it has not engaged in interstate traffic within the six months preceding the filing of the complaint herein.

That it answers no to each of the three questions specifically propounded to it and set forth in the summons heretofore served upon it.

And this respondent prays that the complaint against it be dismissed.

CHICAGO & KENOSHA RAILWAY COMPANY,
By W. G. BRIMSON, *President.*

31 STATE OF ILLINOIS,
*County of Cook, ss:*

W. G. Brimson, being duly sworn, deposes and says that he is the president of the above-named Chicago & Kenosha Railway Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true as he verily believes.

W. G. BRIMSON.

Subscribed and sworn to before me this 13th day of July, A. D. 1892.
[SEAL.] A. M. CROSS,
*Notary Public.*

Prussing, Hutchins & Goodrich, attorneys for respondent. C. S. Holt, J. P. Wilson, Lyman Trumbull, of counsel.

32 EXHIBIT E.

Interstate Commerce Commission. In the matter of the complaint against the Calumet & Blue Island Railway Company and others.

*The answer of the Chicago & Southeastern Railway Company.*

This respondent avers that it is duly organized as a railroad corporation under and by virtue of the provisions of chapter 114 of the Revised Statutes of the State of Illinois, and it avers that it is authorized as such to engage in the business of the transportation of persons and property.

That it has in all respects complied with the obligations imposed upon it by the laws of the State of Illinois as well as by the laws of the United States.

That it has not engaged in interstate traffic within the six months preceding the filing of the complaint herein.

That it answers no to each of the three questions specifically propounded to it and set forth in the summons heretofore served upon it.

And this respondent prays that the complaint against it be dismissed.

CHICAGO & SOUTHEASTERN RAILWAY COMPANY,
By W. G. BRIMSON, *President.*

33 STATE OF ILLINOIS,
*County of Cook, ss:*

W. G. Brimson, being duly sworn, deposes and says that he is the president of the above-named Chicago & South Eastern Railway Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true, as he verily believes.

W. G. BRIMSON.

Subscribed and sworn to before me this 13th day of July, A. D. 1892.
[SEAL.] A. M. CROSS,
*Notary Public.*

Prussing, Hutchins & Goodrich, attorneys for respondent; C. S. Holt, J. P. Wilson, Lyman Trumbull, of counsel.

34 EXHIBIT F.

Interstate Commerce Commission, in the matter of the complaint against the Calumet & Blue Island Railway and others.

*The answer of the Joliet & Blue Island Railway Company.*

This respondent avers that it is duly organized as a railroad corporation under and by virtue of the provisions of chapter 114 of the revised statutes of the State of Illinois, and it avers that it is authorized as such to engage in the business of the transportation of persons and property.

That it has in all respects complied with the obligations imposed upon it by the laws of the State of Illinois, as well as by the laws of the United States.

That it has not engaged interstate traffic within the six months preceding the filing of the complaint herein.

That it answers No to each of the three questions specifically propounded to it and set forth in the summons heretofore served upon it.

And this respondent prays that the complaint against it be dismissed.

JOLIET & BLUE ISLAND RAILWAY COMPANY,
By W. G. BRIMSON, *President.*

35 STATE OF ILLINOIS,
*County of Cook, ss:*

W. G. Brimson, being duly sworn, deposes and says that he is the president of the above-named Joliet & Blue Island Railway Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true, as he verily believes.

W. G. BRIMSON.

Subscribed and sworn to before me this 13th day of July, A. D. 1892.
[SEAL.] A. M. CROSS,
*Notary Public.*

Prussing, Hutchins & Goodrich, attorneys for respondent; C. S. Holt, J. P. Wilson, Lyman Trumbull, of counsel.

36 [Copy.]

Interstate Commerce Commission.

*To W. R. Stirling, 1st Vice-President Illinois Steel Company:*

You are hereby required to appear before the Interstate Commerce Commission forthwith, in the matter of a complaint against The Calumet & Blue Island Ry. Co., Chicago & South Eastern Ry. Co., The Joliet & Blue Island Ry. Co., The Chicago & Kenosha Ry. Co., and the Milwaukee, Bay View, and Chicago Railroad Co., forthwith at room 42 Government building, Chicago, and bring with you then and there the stock book of the Illinois Steel Company.

Dated July 14, 1892.
[SEAL.] JAMES W. MCDILL,
*Commissioner.*

[Copy.]

Interstate Commerce Commission.

*To J. S. Keefe, secretary and auditor, of the Calumet & Blue Island Ry. Co., Chicago & South Eastern Ry. Co., the Joliet & Blue Island Ry. Co., the Chicago & Kenosha Ry. Co., and the Milwaukee, Bay View & Chicago Railroad Co.*

You are hereby required to appear before the Interstate Commerce Commission in the matter of a complaint against The Calumet & Blue Island Ry. Co., Chicago and South Eastern Ry. Co., The Joliet & Blue Island Ry. Co., The Chicago and Kenosha Ry. Co., and the Milwaukee, Bay View & Chicago Railroad Co. forthwith at room 42 Government building, Chicago, and bring with you then and there the stock book or stock books of the above-named railway and railroad companies.

Dated July 14th, 1892.

[SEAL.] JAMES W. MCDILL,
*Commissioner.*

(Endorsed:) Filed Jul' 15, 1892. S. W. Burnham, clerk.

37 Afterwards, to wit, on the twentieth day of September, A. D. 1892, came Wm. G. Brimson, by his solicitors, who filed in the clerk's office of the said court, in said entitled cause, his answer to the petition of the Interstate Commerce Commission, which said answer is in the words and figures following, to wit:

*Answer.*

In the circuit court of the United States of America for the northern district of Illinois, northern division.

In the matter of the complaint of the Interstate Commerce Commission against the Calumet & Blue Island Railroad Company and others.

William G. Brimson, in reply to the application of the said Interstate Commerce Commission for an order, commanding him to appear before said commission and answer the questions propounded to him, and which, upon the advice of counsel, he declined to answer, says that in so declining he intended no disrespect to said Commission, that the issue made by the complaint and order of the said Interstate Commerce Commission, and the answers of the said Calumet & Blue Island Railway Company.

The Chicago and South Eastern Railway Company, the Joliet & Blue Island Railway Company, the Chicago & Kenosha Railway
38 Company, and the Milwaukee, Bay View & Chicago Railroad Company, was not as to the ownership of said railway companies or railroads by the Illinois Steel Company not a party to this proceeding, and over which said Commission had no jurisdiction, but whether said railroads were being operated in such manner as to give illegal and undue preference to the Illinois Steel Company, upon which issue this respondent answered fully as appears from the following questions propounded by said Commission, and his answers thereto.

Q. Have you any official relation to the steel company?
A. None whatever.
Q. You are not an officer of that company?
A. Not in that employ.
Q. Your business is limited to the presidency and management of these companies?
A. I was employed by these companies and remain in their service.
Q. You may tell us whether these companies are officered by the same men as the officers of the steel company?
A. In no measure whatever.
Q. They are not the same?
A. Entirely different.
Q. Do the officers of these five companies have any relation to the steel company?
A. None whatever.
Q. Not in the employment of it in any respect?
A. No, sir.
Q. Has that always been so?
A. Yes, sir; ever since I have been in charge of the company.
Q. There has been no recent change about that?
A. No, sir.
Q. I suppose you are familiar with the way the accounts are kept with these several companies?
A. In a measure; yes, sir.
39 Q. Was the account of each company kept distinct by itself as of a railroad company generally?
A. Yes, sir; entirely distinct.
Q. There is no combination between the operation of these companies, so far as the method of keeping accounts is concerned?
A. No, sir.
(2) How is that with reference to the steel company?
A. Entirely separate and distinct; our dealings with the steel company are just as separate as they would be with any other company.
Q. I understand you that your claim is that each of these railroad companies are as distinct as a corporation in all their methods as any railroad company?
A. Yes, sir.
Q. That is, no relation to one another except as an ordinary physical relation?

* * * * * * *

Q. What did you say that your secretary did?
A. He acts as general freight agent, is secretary and auditor and has charge of freight matters in connection with the issuing of tariffs for switching, and all that sort of thing.
Q. So that you two gentlemen have pretty much all of the management?
A. All except the operation, of course; just the same as all principal officers do.
Q. Each corporation having a person in charge of the particular work of that corporation?
A. Yes, sir.

Q. So far as the transmission of traffic from one to the other and all that?

Q. The roadmasters and so forth are separate?

A. Yes, sir; they are separate.

Q. All of your interstate traffic which you engage in, wherever
40 it goes stands on the Chicago rates?

A. Yes, sir.

Q. I didn't understand the previous answer; it was not entirely clear to my mind; I didn't quite get the import of it.

A. The main business of the companies is that of regular traffic business, switching from different connections to different parties, excepting that our line—running from Chicago to Joliet—we do an interstate business in the handling of coal and in connection with some of the trunk lines, and in that interstate business we pro rate in the handling just as other lines, and at the same rate.

Q. Isn't it a fact that in switching for other railroad companies, switching interstate traffic, that the traffic often comes from beyond this line?

A. It may, or it may not; we don't know anything about that. Our arrangements are the same with all these companies.

Q. If a line of traffic was exchanged you say you have nothing to do with that—with any portion of the road?

A. None whatever.

Q. You don't share in that any way?

A. None whatever.

Q. You get your pay for the job?

A. Yes, sir; so much per car.

Q. What do you get from the Pennsylvania road for switching their cars from their road over to the shops of the steel company?

A. We get our pay for that switching from the Illinois Steel Company.

Q. From the Illinois Steel Company?

A. Yes, sir. They pay us for it. It is no matter who pays us so long as we get our money. We get nothing from the Pennsylvania company.

Q. How is it with the Lake Shore?

A. We get nothing from the Lake Shore.

Q. Where do you get your pay there?

41 A. From the Illinois Steel Company; from any of the consignees, either the Illinois Steel Company or such other firm as we may be doing the switching for.

Q. I have reference to the business of the steel company.

A. Yes, sir.

Q. How much do you say you get from these companies?

A. $3 a car.

Q. I understand you to say you get $3 from the Illinois Steel Company for doing this switching?

A. For moving the car from the outer connection with the Lake Shore or Ft. Wayne into the yard, $3.00 a car; then we have an extra charge of 50 cents a car for the internal moving after that; that is, for moving around inside the yard, weighing it, putting it in and returning it to the scales, and all that.

* * * * * * *

Q. When did you say you began to work for these railroad companies?

A. I was elected president, I believe, on January 17, 1891.

Q. Who preceded you as president?

A. Mr. H. S. Smith was president of some of the roads; there were different individuals; I think Mr. Hinckley was president at one time.

Q. Will you give us a general statement of the concerns, the consignees or shippers that you do shipping for; that is, people here in this city; what concerns besides the steel company, to start with, have you had dealings with?

A. I can give you the tariff if you desire; it is impossible without it to indicate each one.

Q. Have you one present?

A. Mr. Keefe will have one, the general freight agent.

Q. Has he one here?

A. I think he has.

Q. And is he here now?

42 A. He will be here; we deal with persons who have industries on our line.

Q. What does the term other industries mean?

A. That is to cover any who may build in the future along the line.

Q. Any industries that happen to be located along the line of your road?

A. Yes, sir.

Mr. RUTCHINS. You do business for any person in any place that your road strikes?

A. Yes, sir.

Com'r VEAZEY. Do you charge in any other way than car loads?

A. We charge by the car; switching, you understand, is always by the car on all roads.

Q. I don't know but what you gave it to us, but I do not remember now the amount or volume of your business. I think you stated that that was governed by the number of cars you switched?

A. Yes, sir.

Q. We should like to know in a general way what the volume of business is?

A. I can give it to you in a statement.

Q. You may make up such a statement and hand it to us.

A. Yes, sir; I can approximately state now. The Chicago & Southeastern were handling in a year 500,000 cars, the Joliet and Blue Island, and the Milwaukee, Bay View and Chicago, probably 400,000, the Chicago & Kenosha 100,000; that means loaded and empty, in and out.

Q. Do you use anybody else's track besides your own for this switching business?

A. By lease?

Q. Yes, in any way.

A. Yes, sir; but not on these premises. In the inside we use our own track, outside we lease tracks. We have some tracks which join ours which we lease, and we have some joint tracks in which we are

43 joint owners, and others which we lease by paying a trackage rate.

Q. How many miles of such road have you, probably, in round numbers?

A. On the Calumet & Blue Island we have 40 miles.

Mr. HUTCHINS. 40 besides the thirty that you have spoken of?

A. Yes, sir.

Com'r VEAZY. Is that all that you have?

A. That is all; and then we have—on the Chicago and Southeastern we have a trackage right over one mile.

Q. How many cars do you think you switched last year—the year 1891—for concerns other than the Illinois Steel Works?

A. Well, it would be a mere guess.

Q. Give us your best estimate.

A. I think on the Calumet & Blue Island I should imagine 1,500 cars; on the Milwaukee, Bay View & Chicago probably less than that; on the Joliet and Blue Island about the same number; the Chicago and Kenosha probably 50, which is a very small portion of the business, the outside business; the main portion, as I stated before, is the Illinois Steel Company's business.

* * * * * * *

Q. Does this Illinois Steel Company, to your knowledge or information, get any benefit whatever by any device, scheme, arrangement, or understanding between any of these several railroads who do switching over your lines—any benefit or advantage whatever over other shippers?

A. No, sir.

Q. Do you know anything of that kind?

A. I do not, and never did.

* * * * * * *

And this respondent submits to this honorable court that in view of the issue, his own and the other testimony in this proceeding, to
44 which he begs leave to refer, the inquiry as to the ownership of said five railroads was irrelevant, and that in refusing to answer whether said railroads were owned by the Illinois Steel Company he did not refuse to answer a material question propounded to him by said Commission.

Further answering, this respondent denies the power or authority of said Commission of its own motion to make compulsory inquiry into the private affairs of said five railroad companies, or to make this honorable court a subordinate instrument to execute its unregulated and unrestricted demands. And this respondent denies the jurisdiction of this honorable court to lend its aid to a legislative commission possessing no judicial functions in its inquisitorial inquiries into the private affairs of said railroad companies.

And, in particular, this respondent shows that this court has not, and ought not to have, jurisdiction or power to assist said Interstate Commerce Commission in its investigation for the reason that said Commission is conducting said investigation and avows its intention to conduct the same in total disregard of all rules of evidence and of all principles of law observed by courts of justice; that said Commission avows that it will not limit its inquiries to evidence admissible under the rules of law, but that it will receive hearsay and ex parte statements, surmises, suspicions, and any character of information that may be brought to its attention. This respondent further insists that the said questions which he declined to answer were not propounded in any case, controversy, or proceeding of

which this court has or can have any jurisdiction whatever; and
45 he insists that this court has no power except in or incident to such a case, controversy, or proceeding.

And he insists that so much of the act of February 4, 1887, known as the interstate-commerce act, and the amendments thereto, as purports to empower said Commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and so much thereof as purports to authorize the circuit court of the United States to order common carriers or other persons to appear before said Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, is in conflict with the Constitution of the United States and beyond the constitutional power of Congress to adopt, and is wholly void.

WILLIAM G. BRIMSON,
By PRUSSING, HUTCHINS & MCCULLOCH.

C. S. HOLT, JOHN P. WILSON, LYMAN TRUMBULL, *of counsel.*

(Endorsed:) Filed Sept. 20, 1892. S. W. Burnham, clerk.

On the same day, to wit, the twentieth day of September, A. D. 1892, came J. S. Keefe, by his solicitors, who filed in the clerk's office of said court, in said entitled cause, his answer to the petition of the Interstate Commerce Commission, which said answer is in the words and figures following, to wit:

46 In the circuit court of the United States of America for the northern district of Illinois, northern division.

In the matter of the complaint of the Interstate Commerce Commission against the Calumet & Blue Island Railway Company and others.

J. S. Keefe, in reply to the application of the said Interstate Commerce Commission for an order commanding him to appear before said Commission and produce the stock books of the five railroad companies with which he is connected, and answer the questions propounded to him and which, upon the advise of counsel, he declined to answer, or to produce the stock books of said railroad companies, says that in so declining he intended no disrespect to said Commission; that said questions and the production of said stock books were not material or pertinent to any issue or matter pending before said Commission, and of which it had jurisdiction, and if answered would have compelled this respondent to disclose private matters over which said Commission had no jurisdiction, and with which it had no concern. This respondent, further answering, denies the right or authority of said Commission by compulsory process to inquire into the affairs of said railroad companies. He also denies the jurisdiction of this honorable court to compel him to produce the stock books of said railroad companies, or to answer the question propounded to him by said Commission.

He adopts the reply of said William G. Brimson so far as ap-
47 plicable to his case, and refers to the entire testimony taken in this proceeding by said Commission in support of his contention that the production of said stock books and the asking of said questions were irrelevant and immaterial.

And in particular, this respondent shows that this court has not and ought not to have jurisdiction or power to assist said Interstate Commerce Commission in its investigation for the reason that said Commission is conducting said investigation and avows its intention to conduct the same in total disregard of all rules of evidence and of all principles of law observed by courts of justice; that said Commission avows that it will not limit its inquiries to evidence admissible under the rules of law, but that it will receive hearsay and ex parte statements, surmises, suspicions and any character of information that may be brought to its attention.

This respondent further insists that the said questions, which he declined to answer were not propounded in any case, controversy, or proceeding of which this court has or can have any jurisdiction whatever, and he insists that this court has no power except in or incident to such a case, controversy, or proceeding.

And he insists that so much of the act of February, 1887, known as the interstate-commerce act, and the amendments thereto, as purports to empower said Commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and so much thereof as purports to authorize the circuit court of the United States to order common carriers or other persons to appear before said Commission and produce books, and papers, and give evidence, and to
48 punish by process for contempt any failure to obey such order of the court, is in conflict with the Constitution of the United States and beyond the constitutional power of Congress to adopt, and is wholly void.

J. S. KEEFE.
By PRUSSING, HUTCHINS & MCCULLOCH, *his attorneys.*

C. S. HOLT, JOHN P. WILSON, LYMAN TRUMBULL, *of counsel.*

(Endorsed:) Filed Sept. 20, 1892. S. W. Burnham, clerk.

On the same day, to wit, the twentieth day of September, A. D. 1892, came Wm. R. Stirling, by his solicitors, who filed in the clerk's office of said court in said entitled cause his answer to the petition of the Interstate Commerce Comission, which said answer is in the words and figures following, to wit:

*Answer.*

In the circuit court of the United States of America for the northern district of Illinois, northern division.

In the matter of the complaint of the Interstate Commerce Commission against the Calumet & Blue Island Railway Company and others.

49 William R. Stirling, in reply to the application of the said Interstate Commerce Commission for an order commanding him to appear before said Commission and answer certain questions propounded to him, which, upon the advice of counsel, he declined to answer, and to produce the stock books of the Illinois Steel Company, which he declined to produce, says that in so declining he intended no disrespect to said

Commission; that said questions and the production of said stock books were not material or pertinent to any issue or matter pending before said Commission, and of which it had jurisdiction, and if answered, would have compelled this respondent to disclose private matters over which said Commission had no jurisdiction, and in which it had no concern; that the Illinois Steel Company is not a common carrier, subject to the provisions of the act to regulate commerce, but is a private corporation engaged in private business, over which said Interstate Commerce Commission has no jurisdiction, nor is said Commission vested with authority to inquire who the stockholders of said steel company are, or to require by compulsory process the production of its books.

Further answering, this respondent denies the right or authority of said Interstate Commerce Commission by compulsory process to inquire into the affairs of said steel company.

He also denies the jurisdiction of this honorable court to compel him to produce the stock books of said steel company or to answer the questions he declined to answer, and this respondent refers to the testimony taken in this proceeding by said Commission in support of his contention that the production of said stock books and said questions were immaterial and irrelevant.

50 And in particular, this respondent shows that this court has not, and ought not to have, jurisdiction or power to assist said Interstate Commerce Commission in its investigation for the reason that said Commission in conducting said investigation and avows its intention to conduct the same in total disregard of all rules of evidence and of all principles of law observed by courts of justice; that said Commission avows that it will not limit its inquiries to evidence admissible under the rules of law, but that it will receive hearsay and ex parte statements, surmises, suspicions, and any character of information that may be brought to its attention.

This respondent further insists that the said questions which he declined to answer were not propounded in any case, controversy, or proceeding of which this court has or can have any jurisdiction whatever, and he insists that this court has no power except in or incident to such a case, controversy, or proceeding.

WILLIAM R. STIRLING,
By J. C. HUTCHINS, *his attorney.*

And he insists that so much of the act of February, 1887, known as the interstate-commerce act, and the amendments thereto, as purports to empower said Commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and so much thereof as purports to authorize the circuit court of the United States to order common carriers or other persons to appear before said Commission and produce books and papers and give evidence and to punish by process for contempt any failure to obey such order of the court, is in conflict with the Constitution of the United States, and beyond the constitutional

51 power of Congress to adopt, and is wholly void.

WILLIAM R. STIRLING,
By JAMES C. HUTCHINS, *his attorney.*

(Endorsed): Filed Sept. 20, 1892. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-second day of November, A. D. 1892, in the October adjourned term of said court in the record of proceedings of said court in said entitled cause before Hon. Walter Q. Gresham, circuit judge, appears the following entry, to wit:

52 IN RE APPEAL OF INTERSTATE COMMERCE COMMISSION for order, *vs.* W. G. BRIMSTON ET AL. } 22,531. 913.

Now come the parties by their counsel, and now comes on to be heard said application of the Interstate Commerce Commission and the answers of the respondents thereto, and the court having heard the arguments of counsel, takes this matter under advisement.

Afterwards, to wit, on the seventh day of December, A. D. 1892, there was filed in the clerk's office of said court in said entitled cause an opinion by Judge Gresham, which opinion is in the words and figures following, to wit:

53 Circuit court of the United States, northern district of Illinois.

In re Interstate Commerce Commission for an order to compel W. G. Brimson, J. S. Keefe, W. R. Stanley, and others, to produce books and papers and answer certain questions. 913. 22531.

DECEMBER 7, 1892.

GRESHAM, J.

June 18, 1892, the Interstate Commerce Commission made an order at Washington requiring the Calumet and Blue Island Railway Company, the Joliet and Blue Island Railway Company, the Chicago and Southeastern Railway Company, the Chicago and Kenosha Railway Company, and the Milwaukee, Bayview and Chicago Railway Company, and certain other railway companies to appear at Chicago, on July 13th, to answer an informal complaint, made by unknown persons, charging that the Illinois Steel Company had caused the four first-named companies to be organized for the purpose of operating their switches and side tracks at or near Chicago, and engaging in traffic by continuous shipment from places without the State of Illinois to places within that State, in connection with other named carriers, and had caused the last-named company to be organized for the purpose of engaging in like business in Wisconsin;

53½ that the Steel Company owned the five companies, and for six months had operated them in connection with other named railroad companies as a convenient device for evading the provisions of the interstate-commerce act, and obtaining unjust preferences and illegal rates on interstate business. The five companies were particularly required to answer the following questions under oath:

"1. Does any traffic contract, agreement, or arrangement in writing or otherwise, exist between the companies above alleged to be under the control and operated by said Illinois Steel Company, and any of the other companies with reference to interstate traffic; if so, state contract, agreement, or arrangement?

"2. Are any tariffs of rates and charges for the transportation of interstate property in effect between said companies, above alleged to be under the control of and operated by said Illinois Steel Company and said other railroad companies; if so, what are they, and what are the divisions thereof between the several carriers?

"3. Have the companies alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned, during the six months last past, or have they delivered any of said traffic to such other carriers during that time for any person, firm, or company other than the Illinois Steel Company; and if so, to what extent?"

The commission met at the time and place appointed, and the companies alleged to be owned and controlled by the steel company, except the Calumet and Blue Island, appeared and, in writing, under oath answered the three questions in the negative, and denied that during the six months previous to the entry of the order for the investigation they had engaged in
54 interstate commerce. The other company, the Calumet and Blue Island, filed a verified answer averring that it had not engaged in interstate traffic for six months before the filing of the alleged complaint; that no traffic agreement or arrangement existed between it and any of the alleged connecting companies; that no schedule of charges for the transportation of property from one State to another State, was in effect between it and other connecting roads other than this; that on June 13, 1892, it united with the Pennsylvania Railroad Company in a tariff of $2.75 per net ton on car lots of coal from points on the Southwestern Pennsylvania Railroad and the Youghiogheny Northern Railroad to Joliet, by way of Chicago, of which it received forty cents per net ton, that amount having long been the proportion of the through rate allowed to other carriers for the same haul between Chicago and Joliet; that on July 6, 1892, it entered into a similar contract with the Lakeshore and Michigan Southern Railway Company and the Pittsburgh and Lake Erie Railway Company.

The answer denied that the company's road was operated as a device to evade the provisions of the act; denied that its operation resulted in giving the steel company illegal rates, or in affording it any kind of advantage or preference, and denied that it had neglected to file with the commission copies of any agreements or tariffs as required by the act.

Certain officers of the five railroad companies and an officer of the steel company appeared before the commission as witnesses in obedience to its subpœna, and having failed to elicit any facts from them which
55 materially tended to support the charge of unlawful discrimination in favor of the latter company, the commission demanded the stock books of the steel company and the stock books of the five railroad companies for inspection, and in that connection inquired of the witnesses whether they knew who owned the five companies, and especially whether the steel company owned them, or a majority of their stock. On the advice of counsel, the witnesses refused to produce the books or answer the questions, and the commission applied to this court for an order to compel them to do both.

The application is based upon the twelfth section of the commerce act which declares that the commission shall have authority to inquire into

the management and business of all carriers engaged in commerce between the States; that it shall keep itself informed as to the manner and method in which such business is conducted and have the right to obtain from such carriers full and complete information necessary to enable it to perform its duties and accomplish the objects for which it was created; that it shall execute and enforce the provisions of the act; that upon its request it shall be the duty of any district attorney of the United States to institute in the proper court and prosecute under the direction of the Attorney-General, all necessary proceedings for the enforcement of the act, and for the punishment of all violations thereof; that it shall have power to require by subpœna the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation from any place in the United States at
56 any designated place of hearing.

The act further provides that "in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission may revoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section." And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, case of contumacy or refusal to obey a suppœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question, and any failure to obey such order of the court, may be punished by such court as a contempt thereof.

The Interstate Commerce Commission is an administrative and not a judicial body, and the important question presented for determination is: Can the process of this court be exercised in aid of an investigation before such a tribunal? The jurisdiction of the courts of the United States is limited, and it is not competent for Congress to confer upon them authority which is not strictly judicial and clearly within the grant found in the third article of the Constitution. The first section of that article declares that the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time establish; and the second section declares; that the judicial power shall extend to all causes in law and equity arising under the Constitution, the
57 laws of the United States and treaties made or which shall be mad under their authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, &c.

This grant of power was discussed in Osborn vs. Bank of United States, 9 Wheat., 738, and in delivering the opinion of the court Chief Justice Marshall said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

In Smith vs. Adams, 130 U. S., 167, this section was again considered, and in interpreting it the court said: "By those terms are intended the

claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy."

"The functions of the judges of the courts of the United States," said Judge Story, "are strictly and exclusively judicial. They can not, therefore, be called upon to advise the president in any interpretation
58 of law, or act as commissioners in case of pensions or other like proceedings." (2 Story Const., Sec. 1777.)

The application of an administrative body (and we are now considering such an application) to a judicial tribunal for the exercise of its functions in aid of the execution of nonjudicial duties does not make a "case" or "controversy" upon which the judicial power can be brought to bear. It is not a contention between litigants, "brought before a court by regular proceedings for the protection or enforcement of rights or the prevention, redress, or punishment of wrongs."

The Commission was engaged in investigating charges of unlawful discrimination against certain railroad companies, and this court is simply asked to aid that body in obtaining evidence which, it is claimed, will tend to support the charge; the subject of the inquiry is not brought here for adjudication, and this court can exercise no discretion beyond deciding whether the evidence demanded is pertinent to the charge and within the general scope of the twelfth section of the act. Congress can not make the judicial department the mere adjunct or instrument of either of the other departments of government. (Rayburn's Case, 2 Dallas, 249; Perriera's Case, 13 How., 45; McLean's Case, 32 Fed. Rep., 648.)

By an act of Congress passed in 1887, the President was authorized to appoint three commissioners to examine the books, papers, and method of business of all railroad companies which had received aid from the
59 United States, for the purpose of ascertaining whether they had observed the obligations imposed upon them by law. The act gave the commissioners power to require the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation. It also provided "that any of the circuit or district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any person, issue an order requiring any such person to appear before said commissioners, or either of them, as the case may be, and to produce books and papers, if so ordered, and give evidence touching the matter in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof."

Three commissioners were accordingly appointed, and they cited before them Leland Stanford, president of the Central Pacific R. R. Company, one of the corporations which had received Government aid, and propounded questions to him to him touching the administration of the affairs of his company and the alleged dishonest disbursement of some of its moneys, which he refused to answer. He was also required to produce the books of his company, which he declined to do. The circuit court for the northern district of California was thereupon applied to for an order upon

Stanford to show cause why he should not be required to comply with the demand of the commissioners. Mr. Justice Field, Judge Sawyer, and Judge Sabin constituted the court which heard the motion, and they concurred in holding that it was not a case or controversy within the meaning of the Constitution, and that the act under which the commissioners were ap-
60 pointed was unauthorized and void. In a carefully prepared opinion on the motion Mr. Justice Field said: "The court is made the ministerial agent of the commission to perform its behests whenever a witness refuses to respond to a question or produce papers within the range of the authority attempted to be given by the statute. The judicial department of the Government is simply made by this act an adjunct to the legislative department in the exercise of its political and legislative functions and powers to execute its demands, and that, too, in a matter into which Congress, under the decision cited, has no jurisdiction whatever to inquire. I know of no power in Congress to thus render the judicial department subordinate or ancillary to the legislative and executive departments of the Government, or to either of them. If there is any one proposition immutably established I had supposed it to be that the judiciary department is absolutely independent of the other departments of the Government, and that it can not be called upon to act a part subordinate to any other department of the Government. (In re Pacific R. R. Commissioners, 32 Fed. Rep., 251.)

Undoubtedly, Congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offence punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit, or controversy between parties within the mean-
61 ing of the Constitution and not a mere application like the present one, for the exercise of the judicial power in aid of a nonjudicial body.

So much of section twelve as authorizes or requires the courts to use their process in aid of inquiries before the Interstate Commerce Commission is unconstitutional and void, and the application is dismissed.

(Endorsed:) Filed Dec. 7, 1892, S. W. Burnham, clerk.

62 On the same day, to wit, the seventh day of December, A. D. 1892, in the October adjourned term of said court, in the record of of proceedings of said court in the said-entitled cause, before Hon. Walter Q. Gresham, circuit judge, appears the following entry, to wit:

In the matter of the application of the Interstate Commerce Commission for an order to compel W. G. Brimson, J. S. Keefe, and W. R. Stirling to produce books and papers and answer certain questions.

The questions of law and fact involved in the application or petition filed herein having heretofore been fully argued by the attorneys of the respective parties hereto, and the court being fully advised in the premises, in consideration whereof, doth find, that so much of section twelve of the

act known as the interstate-commerce act as authorizes or requires the courts to use their process in aid of inquiries before the Interstate Commerce Commission is unconstitutional and void; the reasons for such finding being fully set forth in the opinion of the court this day filed. And it is therefore ordered that said application or petition be, and the same is hereby, dismissed, from which decision and order of the court in dismissing said application or petition, the district attorney of the United States in and for said district, in the name and on behalf of the said Interstate Commerce Commission, and by direction of the Attorney-General of the United States, prays an appeal to the Supreme Court of the United States, which appeal is hereby allowed.

63 Afterwards, to wit, on the eighteenth day of January, 1893, came the Interstate Commerce Commission by Thomas E. Milchrist, United States district attorney, who filed in the clerk's office of said court in said-entitled cause, an appeal and assignment of errors, which said appeal and assignment of errors is in words and figures following, to wit:

In the circuit court of the United States of America for the northern district of Illinois, northern division, December term, A. D. 1892.

In re, application of Interstate Commerce Commission for an order to compel W. G. Brimson, J. S. Keefe, W. R. Stirling and others to produce books and papers and to answer certain questions. Gen. No. 22531. Term No. 913.

And now comes the Interstate Commerce Commission by Thomas E. Milchrist, United States attorney, and by direction of the Attorney-General of the United States, prays an appeal of said application and proceeding to the Supreme Court of the United States, from an order of the court entered herein dismissing said application.

THOMAS E. MILCHRIST,
*United States Attorney, Atty. for Appellants.*

December 7th, A. D. 1892.

In the circuit court of the United States of America for the northern district of Illinois, northern division, December term, A. D. 1892.

64 In re application of Interstate Commerce Commission for an order to compel W. G. Brimson, J. S. Keefe, W. R. Stirling and others to produced books and papers and to answer certain questions.

*Assignment of errors.*

1st. That the court erred in deciding that so much of section twelve (12) of the act of Congress, entitled an act to regulate commerce as authorized or requires the courts to use their process in aid of inquiries before the Interstate Commerce Commission is unconstitutional and void.

2d. That the court erred in dismissing said application.

3rd. That the court erred in refusing to make the order prayed for in the said application.

THOMAS E. MILCHRIST,
*United States Attorney, Atty. for Appellants.*

December 7th, 1892.

(Endorsed:) Filed Jan. 18, 1893. S. W. Burnham, clerk.

65 NORTHERN DISTRICT OF ILLINOIS,
*Northern Division, ss:*

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the matter of the application of the Interstate Commerce Commission for an order to compel W. G. Brimson, J. S. Keefe, and W. R. Stirling to produce books and papers and answer certain questions, as the same appears from the records and files of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this thirtieth day of January, 1893.

[SEAL.] S. W. BURNHAM, *Clerk.*

66 UNITED STATES OF AMERICA,
*Northern District of Illinois, Northern Division, ss:*

*To W. G. Brimson, J. S. Keefe, W. R. Stirling, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, holden at Washington, D. C., on the sixteenth day of February, A. D. 1893, pursuant to an order granting an appeal from the order filed in the clerk's office of the circuit court of the United States, for the northern district of Illinois, wherein Interstate Commerce Commission is plaintiff, and you are defendants, to show cause, if any there be, why the order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, judge, this 17th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

W. Q. GRESHAM.

67 Service of the within citation accepted this 17th day of January A. D. 1893.

L. & P. TRUMBULL,
*Attys. for Appellees.*

(Indorsed:) Supreme Court of the United States. Interstate Commerce Commission vs. W. G. Brimson et al. Citation to February 16th, A. D. 1893.

(Indorsed on cover:) Term No. 883. Case No. 15252. The Interstate Commerce Commission, appellant, vs. W. G. Brimson, J. S. Keefe, & W. R. Stirling. N. Illinois. C. C. U. S. Filed February 3rd, 1893.

154-447

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

No. 883.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

W. G. BRIMSON, J. S. KEEFE, AND W. R. STERLING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE APPELLANT.

# Supreme Court of the United States

OCTOBER TERM, A. D. 1893.

No. 883.

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THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

*vs.*

W. G. BRIMSON, J. S. KEEFE, AND W. R. STIRLING.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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## BRIEF ON BEHALF OF THE APPELLANT.

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### STATEMENT OF THE CASE.

On the 15th day of July, 1892, the District Attorney of the United States for the northern district of Illinois filed in the Circuit Court of the United States for that district a complaint entitled, "In the Matter of the Complaint of the Interstate Commerce Commission against the Calumet and Blue Island Railway Company and others," setting forth:

1. The organization and public character of the Interstate Commerce Commission.

2. That the Commission, in pursuance of a complaint made to the Commission that the Illinois Steel Company, an Illinois corporation, had caused to be incorporated, under the laws of Illi-

nois, the Calumet and Blue Island Railway Company for operating interstate commerce in connection with the Baltimore and Ohio Railroad Company and other railroads.

3. That the said Steel Company had also caused to be incorporated the Chicago and Southeastern Railroad Company for the same purposes.

4. That the said Steel Company had caused to be incorporated the Joliet and Blue Island Railway Company for the same general purposes.

5. That the said Steel Company had caused to be incorporated the Chicago and Kenosha Railroad Company for the same purposes.

6. That the said Steel Company had also caused to be incorporated, under the laws of Wisconsin, the Milwaukee, Bay View and Chicago Railroad Company for the same general purposes.

7. That it had been represented to the Commission that said Steel Company was the owner and had control of all said companies, and was operating the same in connection with other railroad companies as a device for the purpose of evading the acts of Congress concerning interstate commerce and to obtain unjust and illegal rates, etc., and in such a manner as to give the said Steel Company an undue and unreasonable advantage over other companies and persons in the course of interstate commerce, etc. (Rec., p. 2.)

8. That these unjust devices, etc., were in actual execution under the common conduct, management, and arrangement of the various corporations and other railroads in the course of interstate commerce.

9. That none of the companies so owned, etc., by the Steel Company had filed copies of their agreements, etc., with the other companies, nor had they filed their tariff schedules, etc., as required by law. (Rec., pp. 2, 3.)

10. That the Commission in June, 1892, decided to investigate the matter of such complaints.

11. That accordingly, on the 14th of June, 1892, the Commission entered an order, with a statement of the complaint, directing the railroads complained of and the several railroads having common connections, etc., to severally file with the Commission, by a day named, an answer on the subject, and setting

out specially the chief matters to be answered, and that said companies appeared and answered. (Rec., p. 3.)

12. That the Calumet and Blue Island Company, the Chicago and Southeastern Company, the Chicago and Kenosha Company, and the Milwaukee, Bay View and Chicago Company in their answers denied the matters alleged against them, etc. (Rec., pp. 4, 5.)

13. That the Commission, on consideration of the answers, decided to proceed to investigate the complaints and denials by the examination of witnesses and the books and papers of the companies, to the end of administering justice in the matter according to law. (Rec., p. 5.)

14. Accordingly, Brimson, the general manager, and Keefe, the secretary, of the five companies complained of, were duly summoned and appeared and were sworn as witnesses; and, after answering sundry questions relating to the matter, Brimson, under the advice of counsel for the companies, refused to answer the question whether the Steel Company was the owner of the railroad companies, on the ground that the question was not relevant. (Rec., p. 6.)

15. Keefe, being under examination, refused, on the direction of counsel for the railroad companies, to answer the question whether he knew, as a matter of fact, that the Steel Company owned the greater part of the stock of the railroad companies. (Rec., pp. 6, 7.)

16. Stirling, being on the witness stand, said he was first vice-president of the Steel Company, etc., and was asked what relation existed between his company and the five railroad companies, etc., and he, under the advice of counsel for the railroad companies, refused to answer. (Rec., p. 7.)

17. Keefe and Stirling were then summoned, *duces tecum*, to produce the stock books of the five railroad companies and the stock book of the Steel Company. They appeared in answer to the subpœna, but refused to produce the books. (Rec., p. 7.)

18. The Commission thereupon, with the District Attorney, filed in the Circuit Court this complaint, and prayed for an order requiring Brimson, Keefe, and Stirling to appear before the Commission and answer these questions and produce the books. (R., pp. 7, 8.)

19. The three respondents appeared in the Circuit Court and filed answers to the complaint, setting up:

(1) That the questions put were immaterial and irrelevant to the inquiry being made by the Commission.

(2) That the Commission had no jurisdiction to make the inquiry; and

(3) That the Circuit Court had no jurisdiction to act on the subject. (R., pp. 15–23.)

20. The case came on to be heard on the complaint and answers, and it was argued by counsel. (R., p. 24.)

21. The Circuit Court dismissed the complaint on the sole ground that the act of Congress authorizing the proceeding before the court was unconstitutional and void. (R., p. 24–28.)

From this decree an appeal was taken to this Court by the Commission and by the District Attorney, under the order of the Attorney-General. (R., p. 29.)

The errors assigned will be found on page 29 of the record.

The section of the act of Congress bearing on this case is Section 12, as amended by acts of March 2, 1889, and February 10, 1891, as follows:

SEC. 12. (As amended March 2, 1889, and February 10, 1891.) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs,

contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers, if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

**POINTS.**

I. The Constitution declares that Congress shall have power "to regulate commerce with foreign nations and among the several States." * * * (Art. I, s. 8, cl. 4.) And it declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or any department or officer thereof." * * * (Art. I, s. 8, cl. 19.) And it declares that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, * * * to controversies in which the United States shall be a party."

II. The power to regulate commerce necessarily and confessedly includes the power to provide all means fairly adapted to the complete exercise of the power.

III. One (and perhaps the most salutary of all) of these means is the establishment of a national, official body, by whatever name styled, to put into execution the principles and regulations declared by law, and in so doing, and, as essentially and indispensably a part thereof, to investigate the course and practice of interstate commerce as carried on by whomsoever engaged in it, and so to ascertain whether or not it is carried on according to the requirements of law.

IV. To these ends Congress possessed the power which it exercised in the enactment of the law, of making it the *legal duty* of every such carrier, whether corporate or personal, and of every other person having knowledge of the subject under consideration, to appear, on due summons, before the Commission and produce the papers and give the evidence it or he might possess legitimately relating to the matter so lawfully under consideration.

V. If the obligation of these witnesses to appear and answer the inquiries put to them was a legal duty (which it is assumed will not be denied, and which if not a legal duty Congress could have no power to denounce punishment for not performing it) it necessarily follows that Congress, having imposed it, could provide the natural and necessary means of compelling performance, as well as punishing nonperformance.

VI. The natural, necessary, and only lawful means of compelling the performance of any legal duty (except payment of taxes and military service, etc.) is by the exertion of the judicial power.

VII. This is done by an application to a court, in whatever mode or form the law may provide, by the party entitled to have the duty performed, against the party complained of, stating the case and the alleged breach of duty, and praying the court to decree in due course that the respondent shall perform the duty he had so refused.

VIII. This is obviously the only adequate means to the great public end of producing in *fact* the rectification of evils that may and do exist in the operations of interstate commerce. Punishment is not redress. The ascertainment of truth and the consequent orders for just administration is regulation and redress. In the case of mere punishment, the penalty may be paid and the evil still go on without cessation. In the other case, the truth being ascertained, the actual correction of the evil can be required and compelled.

IX. Such a proceeding as that in this case by a party having a statutory standing as complainant against a party who has refused to perform a duty that a valid statute required him to perform is, within the very letter as well as the spirit of the Constitution, a "case" and a "controversy," which the judicial power was established to hear, try, and determine. It has no

element, quality, incident, or consequence other than a judicial one. There are two parties before the court whom the law (which may always establish and regulate procedure) has declared may be in court—the one appealing to the court to compel the other to perform a specified legal duty that he owes to the other. This is the very essence, and very nearly a complete definition, of judicial power and of jurisprudence. It is submitted with respectful confidence that it embraces every feature of the transactions under consideration. It is affirmed as well as admitted that neither the courts nor their judges can be called upon to render any *administrative* aid to any other department of the Government, but that they can be, and always have been, called upon to give, and have always given, *judicial* aid to all other departments and to citizens and strangers, is simply saying that they have obeyed the law of their being.

X. It will not be denied, and it can not be doubted, that it is a due and constant exercise of the judicial power to command the performance of any duty that any person or corporation is legally bound to perform, either to the public or to an individual, and to do it under such modes and forms of procedure as the legislative power shall have prescribed. If Congress has no power to impose such a duty the judiciary can neither compel a performance nor punish a nonperformance. But if Congress has and exercises the power to impose such a duty, no matter to whom it may be imputed, the judiciary is bound (if the law has so provided) to hear the complaint of the party seeking performance, and to decide whether the other party owes the duty demanded, and, if the duty is found to exist, to decree its performance. The foregoing would seem to be the statement of a truism, but it is a statement in the abstract of this very case; in every aspect of it.

XI. But the Circuit Court declined to consider whether the questions were proper or whether the papers demanded were relevant, and dismissed the petition on the sole ground that the act of Congress was unconstitutional in providing for such a petition and in giving jurisdiction to the court to hear and determine it upon its merits.

XII. In this case a formal petition setting forth the facts was filed in court by the District Attorney of the United States

on behalf, and in the name of, the Commission, against the persons alleged to have been guilty of a breach of a legal duty owing to the United States and to the Commission in its public character, and praying an order of court requiring performance of that duty. The parties complained of appeared in court and made formal answers to the petition. Thus, then, was presented in due form to the court the purely judicial question whether the respondents were bound in law to do that which the United States by the Commission had required, and which, it was alleged, they had refused, and, if so, whether they had refused performance.

It was both a "case" and a "controversy" arising under the laws of the United States, and to which the United States were, in substance and effect, parties. The controversy had two opposing parties legally interested in it. It was brought into court by one of them, praying redress and the performance of a legal obligation against the other. The court had been given jurisdiction of that very class of cases and controversies. The mode of procedure was provided for by law. The court was neither required nor authorized to exercise any function in the matter, whatever, other than to hear the parties and decide judicially whether the parties complained of were bound by law to do that toward the petitioners which they had refused to do, and to decree accordingly. Such a state of things viewed from whatever side, and measured by any standard known in jurisprudence, was a controversy and a case arising under the Constitution and laws of the United States.

The admitted jurisdiction of the courts to hear and determine complaints by the Commission for disobedience of their final orders upon carriers is of precisely the same legal character as the jurisdiction here invoked. The only difference of circumstance is that one arises in the course of the proceeding of the Commission in a particular case and in the other at the end of such proceeding. It was not a case in which the court was required or authorized to do any administrative act whatever. It was a case in respect to which the decree of the court was an absolute judicial finality. The sole duty of the court was (as in every other case before it) to determine in judicial course whether there had been a breach of a duty that the defendants were

legally bound to perform, and if such was found to be the case, to decree performance—if otherwise, to dismiss the petition. If such principles, so applied to interlocutory proceedings in the administrative departments of the Government are contrary to the Constitution, they can not be applied to any duties that the law may impose upon officers, corporations, or persons, for it is impossible in respect of judicial *jurisdiction* to distinguish between one class of persons and duties and another.

It is the province of the legislative and not of the judicial power to say what the form of procedure and remedy shall be in every case of an officer or person who has refused to do that which a valid law has required him to do, subject of course to the provisions requiring jury trial, etc., not applicable here. In cases like the present one, the legislative power has declared that the procedure shall be of the character employed in this case. In cases of disobedience to the final orders of the Commission, it has provided a similar remedy. In cases of failure to report tariffs, etc., by carriers, it has provided no special remedy, because the common course of procedure in the courts in such cases was clear and adequate.

The judiciary can not constitutionally compel affirmative obedience to any part of the interstate commerce acts if it can not do it as to this part of them. Nor could it (on such a view of the Constitution) exercise affirmative compulsory power in respect of the land laws, the customs laws, the tax laws, the corporation laws, the election laws, the extradition laws, the alien laws, the census laws, or the naturalization laws, etc., in the multitude of instances that occur under them. In all of these the judicial power always has been invoked and exerted in aid of the executive departments of the government—not as *administrative* aid, but as *judicial* aid in compelling obedience to law, which, together with the function of punishment, is the all-embracing definition of judicial power.

XIII. The cases which are supposed to bear upon this question more or less directly are, so far as they need to be cited, the following:

*Hayburn's Case*, (2 Dall., 409) was simply and purely an instance of the judges being required to perform a distinctly administrative duty.

In *Osborne Bank* v. *United States* (9 Wheat., 818), the fundamental proposition upon which we stand is laid down thus:

"The legislative, executive, and judicial powers of every well-constructed government are coextensive with each other; that is, they are potentially coextensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law."

After citing the passages of the Constitution, the judgment proceeds thus:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by the party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

In *United States* v. *Ferreira* (13 How., 45) the district judge had no authority to do anything but inquire and report to the Secretary of the Treasury, who had power to review the report and determine whether the claims ought to be paid. It was a purely and exclusively administrative inquiry, although in its nature it possessed some judicial quality. Chief Justice Taney appears to have put the decision in the case upon this ground, and to point out that it was wanting in judicial character in the respects that in this case are fully supplied both by the act of Congress and the form of the proceeding. He says that although a petition was filed by the claimant and the district attorney appeared for the United States, etc., the acts of Congress required no such petition and that the district attorney had no right to enter an appearance for the United States so as to make them a party, and so convert the proceeding into a judicial one.

The case of *United States* v. *Ritchey* (17 How., 525) arose under the California land commission act. It was objected that the law prescribing a review by the court of the action of the board of commissioners was unconstitutional, as the commission could not be invested with judicial power, but the court said that

the proceeding in the district court was an original proceeding and that the district court had jurisdiction.

In *Murray's Lessee*, v. *Hoboken Land Co.* (18 How., 272), Mr. Justice Curtis, after stating the fundamental separations of the several powers of the Government, says:

> At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

He refers to land claims, etc., as instances.

*McLean's Case* (37 Fed. Rep., 648) was an application to a judge of the circuit court for a subpœna to require the attendance of a witness before a special pension examiner under section 184 of the Revised Statutes. That case, whether the decision was law or not, is entirely distinguishable from this. The granting or withholding of pensions was entirely within the discretion of the Pension Office, and inquiries respecting the same could be carried on by any person appointed by the Commissioner. Here the Interstate Commerce Commission is charged by a valid act of Congress with a public inquiry, with contending parties and interests before it, constituting a definite controversy arising under the laws of the United States. It has power, and it is its duty as much as if it were a judicial court with general jurisdiction, to decide such controversies and to require in the way provided by law the performance of what it may thus lawfully command. It is as complete a tribunal as a private land claims commission, as a Territorial court, or as the present land court.

In cases of extradition it may be assumed that the power is a political power resting in the chief of the State. But the laws have always provided that judges, etc., may hear the matter and report to the executive as an aid and guide to him in the performance of his political functions. And it can not be doubted that in such cases witnesses may be compelled to appear and testify, and the production of papers enforced. Yet, it is all in aid of the exertion of an exclusively political power.

The observations of Mr. Justice Jackson in the *Kentucky*

*bridge case* (37 Fed. Rep., pp. 613–14), are entirely apposite to our contention, and that case only differs from this, in the respects now under consideration, in the circumstance that it came into the circuit court at a later stage in the proceedings.

In *Smith* v. *Adams* (130 U. S., 167), a Territorial law allowed a contest concerning an election to be made against the county commissioners and in the district court. A contest was made accordingly. This court held that such a contest was one of judicial cognizance, within the meaning of the terms, cases, and controversies used in the Constitution, and said:

"By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights or the prevention, redress, or punishment of wrongs."

The courts of the United States exercise unquestionable jurisdiction in aid of the administrative departments in the enforcement of the customs laws, a jurisdiction much more nearly approaching an administrative one than the interstate commerce jurisdiction. (*In re Fassett*, 142 U. S., 479; *Passavant* v. *U. S.*, 148 U. S., 214.)

The recent and famous case of *Fong Yue Ting* v. *United States* (149 U. S., 698) lays down doctrines that completely and conclusively, as we think, support our contention. It was held that the action of the judge in respect of the deportation of the party was a constitutional judicial action. And the dissenting opinions do not appear to rest upon any supposed intrinsic vice in the mere mode of procedure, except, possibly, in respect of the vagueness of the statutory designation of the judge.

The case of the *Pacific Railroad Commission* (32 Fed. Rep., 241) is, it is submitted, not at all inconsistent with the appellant's contention in this case. In the first place, the act of Congress creating the commission with the powers imputed to it was unconstitutional.

There was no pretense of jurisdiction for any such inquiry other than the fact that the United States stood in the attitude of a creditor toward the particular corporations named; and it was in defense of that attitude that the whole scheme proceeded. The United States has no more right in its attitude as a creditor than has any person in private life in respect of his

debtors. The United States may inquire; so may the citizen, and each may use all the means within its lawful power to pursue the inquiry, and no more. The act did not look in its results to any step whatever in respect of enforcing law. In such a case the language of the court in holding that it could not aid such an inquiry which began on a purely private foundation, went everywhere and ended nowhere, was sound. That case and this were different in every essential feature. Their only resemblance consists in the circumstance that in both instances there was a witness. This case falls essentially and in every philosophical particular within the principle upon which testimony is perpetuated in advance of any principal suit being commenced.

(See also *Canal Commissioners* v. *Willamette*, 6 Oreg., 219; *People* v. *State Ins. Co.*, 19 Mich., 392.) These were cases of mandamus, it is true, but the suits were for the performance of a duty in the course of the inquiries of State officers. But, as we have before stated, the form of procedure, whether by mandamus, mandatory injunction, or a summary order, is one that the legislature has undoubted power to prescribe. (See also *Lippman's Case*, 3 Ben., 95; *Meador's Case*, 1 Abb., 317.)

XIV. It only remains to consider whether the requirements of the Commission upon the respondents were lawful ones, and upon this question it is submitted:

1. That, inasmuch as the decree of the court below was based solely upon the question of the power of the court to act at all, the matter of the relevancy of the questions asked and of the papers called for is not open for consideration here. (*Passavant* v. *U. S.*, 148 U. S., 214; Circuit Court of Appeals, *act March* 5, 1891, § 5, 6.)

2. But if the propriety of the action of the Commission is now open for review, then it is insisted that the questions refused to be answered and the papers refused to be produced were relevant to the subject-matter under consideration by the Commission. The complaint to the Commission was that a single steel corporation owned the whole five railroads and, in substance, that the railroads and the steel company were really one interest, and that the company was operating the same, in connection with other roads, as a device to evade the law and, by connivance with other

roads, in such a manner as to give the steel company unlawful advantages over other shippers. The railroad companies denied that they were giving the steel company undue advantages. Whether this was true or not was the main issue.

The natural and first step in testing the truth of these denials was to know the relations between the railroad companies and the steel company. If there were no relations of identified interest and ownership the evidence pro and con on the subject of the alleged contrivances and unjust acts would stand in a very different light as to the weight to be given it than if the railroad companies before the Commission were independent of each other and independent of the party alleged to be favored. These officers of the companies had denied any breach of law, and were then asked if the steel company did not own them all, etc. They refused to tell. Their replies were not, as seems to have been argued below, the be-all and end-all of inquiry. It was the duty of the Commission to go forward and find out the very truth of the matter by the means attempted and by further full examination of all the relations between the steel company and the railroad companies relating to the interstate traffic in which they were engaged.

The mere statement of the situation is, it is thought, a sufficient answer to the objection of the irrelevancy of these questions and of the ownership of the stock. And it may be added that if these companies were engaged in interstate commerce, there was nothing connected with any part of their affairs that the Commission had not a right and was not bound, in case of complaint, to know, not only who were the owners of their stock and the controllers of their roads, but whether they or their officers were owners or interested in the Steel Company, whose interstate business they were transacting. The hearing had just begun. The statements of these officers were not conclusive, and had the questions been answered and the books produced their denials might have been overcome perhaps by their own evidence. But the examination was suspended at the threshold by the necessity of applying to the court in the manner before stated.

Perfectly analogous to the jurisdiction contended for here are many instances of immemorial jurisdiction where the principal

and final matters were not before the court called upon to act. Among these are:

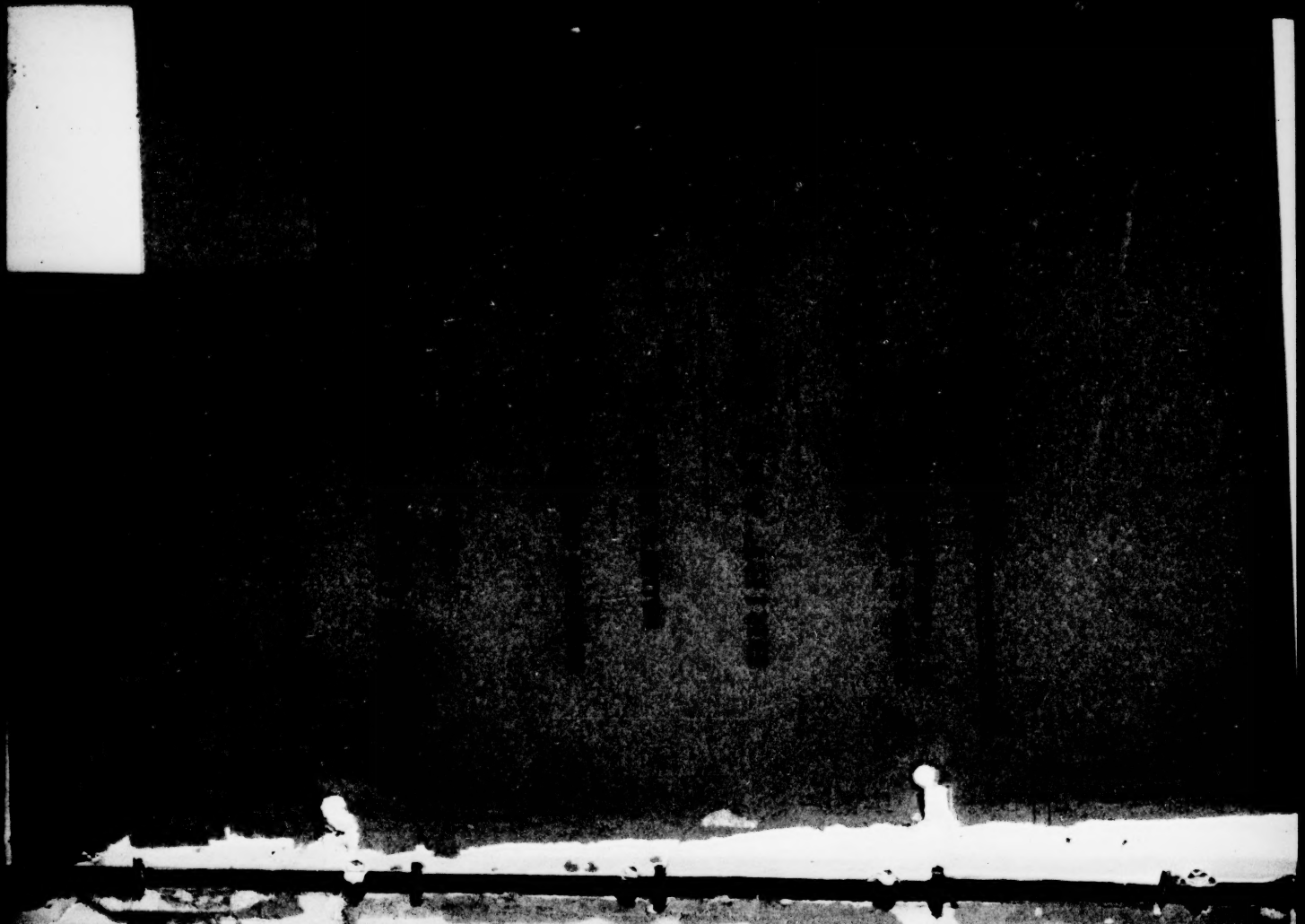
Injunctions to stay waste, etc., pending suits at law to try titles (*Erhardt* v. *Board*, 113 U. S., 537; *Kinslen* v. ———, 2 Hill, N. Y. Ch. Rep., 617). Certiorari (Story Eq. Pl., s. 18). Bills to perpetuate testimony (Story Eq. Juris., s. 1512; see also act of 1787, s. 30). Bills for examination of witnesses (Story, Eq. Pl., s. 19; and see act of 1827, s. 2). Bills of discovery (Story, Eq. Pl. s. 19), and the judicial course on letters rogatory (10 Stat., 630; 12 Stat., 769; Rev. Stat., 4071–4073; *Nelson* v. *United States*, Pet. Cir. Court, Rep. 235; *Mexico* v. *De Arangoiz*, 5 Duer, 634; *Kuchling* v. *Lieberman*, 9 Phila., 160; Matter of Spanish Consulate, 1 Benedict, 235).

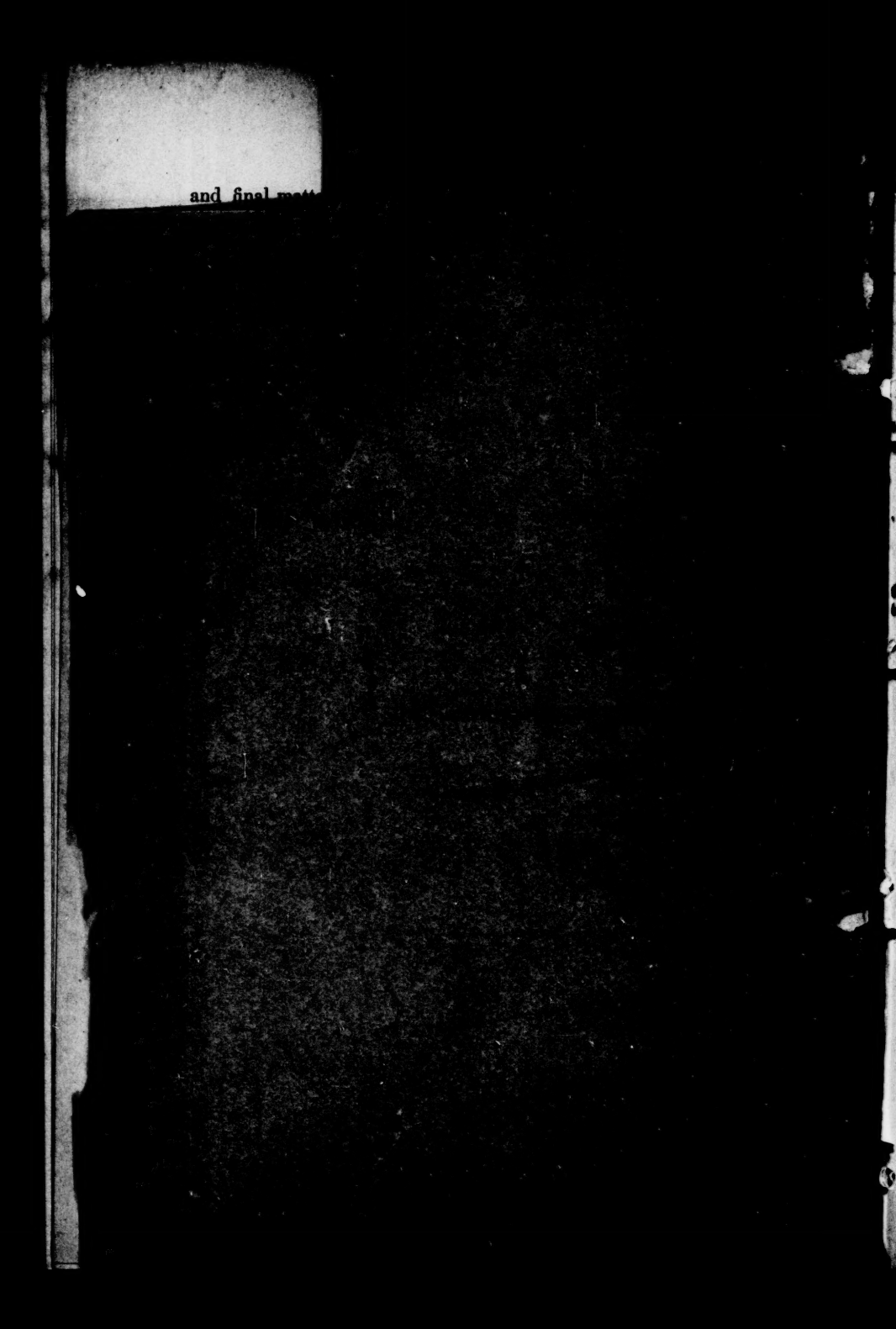
No court of the United States can exercise any other than judicial power, and it can not exercise judicial power without having a "case" or a "controversy" before it. How, then, can all these courts exercise power in all these varied instances otherwise than under the very principle before stated, that is, that it is the exertion of judicial power to pass and act upon the application of a party demanding relief in respect to another who is bound by law to do the thing asked, and that such an application in the form prescribed by law is a "case," and if disputed is a "controversy?"

Respectfully submitted by—

GEO. F. EDMUNDS,
*Of Counsel.*

RICHARD OLNEY,
*Attorney-General.*




and final

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

**No. 883.**

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**INTER-STATE COMMERCE COMMISION,**
*Appellant,*
*vs.*
**WILLIAM G. BRIMSON et al.,**
*Appellees.*

**Appeal from Circuit Court, Northern District of Illinois.**

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## BRIEF AND ARGUMENT.

It appears from various indications in his brief that the distinguished counsel who appears in this court for the Inter-state Commerce Commission, regards it as a matter of trifling importance what kind of an investigation was in progress when the witnesses refused to answer certain questions and produce certain books, and a trifling matter also what were the questions and the books. To us, on the other hand, it seems a matter of great importance to know just what the Inter-state Commerce Commission was trying to do, in order that we may ascertain whether it had a right to do it. Several ill-founded assumptions in the brief for appellant will find their suitable commentary in a careful study of the facts.

Counsel for appellant has given in the opening pages of his brief a summary of the petition which was filed by the district attorney in the Circuit court; with some unintentional departures from the record, as, for example, under his paragraph 13, where he says that the Commission decided to proceed to investigate, etc., "*to the "end of administering justice in the matter according to "law.*" The words quoted are not found in any portion of the record, and must be ascribed to the mental processes of the distinguished counsel. This is not very material. The important thing is that we should learn the real character of the investigation, in the course of which the questions now in issue arose. We may learn this at first hand, not from counsel's summary of the petition filed in the Circuit court, nor even from the petition itself, but from the documents attached thereto, and particularly the order for investigation, which appears as Exhibit A, at record, page 8, *seq.* This document was the foundation of the entire proceeding. It recites that imformal complaint has been made to the Commission that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated the Calumet and Blue Island Railroad Company, and four other railroad companies, under the laws of Illinois and Wisconsin respectively, for the purpose of operating switches and side-tracks at specified points, and of engaging in traffic by continuous shipment from cities and places without the States of Illinois and Wisconsin, respectively, to cities and places within those states, in connection with various other railroad companies named.

It was further recited that in said informal complaint, it had been stated that the Steel Company owns and controls the five railroad companies first above mentioned

(which may be conveniently designated as the "switch-"ing roads"), and *operates the same in connection with the railroads of the other companies named, as a device for the purpose of evading the provisions of the interstate Commerce Act, and obtaining special, illegal, unjust and unreasonable rates for the transportation of interstate traffic, and operates the same by the connivance and consen of said other connecting railroad companies, in such manner as to give the Steel Company an illegal, undue and unreasonable preference and advantage.*

It was further recited that said switching roads had been for more than six months engaged in interstate traffic, and had failed to file copies of agreements and tariff schedules.

It was further recited that the commission, of its own motion, has decided to investigate the said informal complaint by inquiring into the business of all such railroad companies, both those so owned, controlled and operated by the Illinois Steel Company, and also said other railroad companies operated in connection therewith and the management thereof by all of such carriers, *with reference to the alleged making of illegal, unjust and unreasonable special rates, and also as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company*, as well as the failure to file agreements and tariffs.

It was therefore ordered that the companies named, file their answers to the matters complained of, and particularly answer three questions, which were in substance, as follows:

1. Whether any agreement existed between the switching roads, and any of the other roads with refer-

ence to interstate traffic, and if so, what was such agreement.

2. Whether any joint tariffs were in force between the switching roads and the other railroads, and if so, what was the division of rates.

3. Whether any of the switching-roads, within six months, have handled any interstate traffic except for the Illinois Steel Company,

The Steel Company was not a party to the proceeding, nor as we understand the law could it have been made a party. The switching roads filed full answers to the questions asked, and the answers were supported by the testimony of witnesses, including officers and employes both of the Steel Company and of the switching roads. Not only was there elicited nothing to show an evasion of the law, but it was affirmatively shown that there was no such evasion.

It appeared that the Calumet and Blue Island Company, alone of the five switching roads, was then engaged or ever had been engaged in interstate traffic, and in the case of that road the traffic consisted simply of an agreement with several companies transporting coke from the Connellsville region in Pennsylvania, whereby the Calumet and Blue Island hauls the coke from Chicago to Joliet and receives as its *pro rata* for that service the sum of forty cents per ton out of a through rate of $2.75. This forty cent rate is the established and customary rate paid by the eastern roads to all carriers hauling coke from Chicago to Joliet, and was in force between the eastern roads and their Chicago connections, long before the incorporation of the Calumet and Blue Island, and before the passage of the Interstate Commerce Act.

It further appears from the undisputed evidence of all the witnesses that the switching roads are separate and distinct corporations, and are wholly separate and distinct from the Steel Company; that no officer of any of the railroad companies is an officer of the Steel Company, nor does any officer of the Steel Company hold any official position whatever with any of the railroads; that the accounts of the railroads are separate and distinct from each other; that there is no combination in the operation of the companies so far as the method of keeping accounts is concerned, and the dealings of each one of the switching roads with the Steel Company are as separate and distinct as they are with any other company with which they do business; that each of the switching roads is accustomed to do business for any person in any place which could be reached by their respective lines, and that as with other roads, their charge for switching is made by the car, and is fixed at the same figure commonly charged by other companies for the same service; and that the Steel Company does not by any device, scheme, arrangement or understanding whatever between any of these several railroads receive any benefit or advantage over other shippers.

The finding of the court below is that the Commission "*failed to elicit any facts which materially tended to sup-*
"*port the charge of unlawful discrimination in favor of the*
"*Steel Company.*" (Rec., 25.)

With this evidence in the record, and with the affirmative testimony of every witness who was called on the subject, that neither the switching roads nor the Steel Company were in any manner concerned in any device, scheme or arrangement whereby any advantage or preference was obtained in respect of interstate freight rates,

the Commission demanded that the officers of the switching roads produce their stock-books, and demanded of the officers of the Steel Company, in like manner, the production of the stock-books of that company. They also inquired of the officers of the switching roads whether they knew who owned the stock of those roads, and in particular whether the Steel Company owned them or a majority of their stock. It is these questions relating to the ownership of the stock, and these demands for the production of the stock-books which alone were resisted by the witnesses under the advice of cousel, and it is with them alone that the court on this hearing has any concern.

We shall consider hereafter whether the evidence sought by these inquiries was, or could be, material to the investigation. Before coming to this, however, we are confronted with a much more serious and far-reaching problem, the solution of which, in accordance with our views of the law, will dispense with any further consideration of the question of materiality. This problem presents a twofold aspect:

*First.* HAD THE COMMISSION ANY LAWFUL AUTHORITY TO MAKE THE INVESTIGATION AT ALL? AND,

*Second.* IF SO, HAS THIS COURT ANY LAWFUL AUTHORITY TO AID THE INVESTIGATION IN THE MANNER DESIRED BY THE COMMISSION?

We may, perhaps, narrow the field of debate by one or two disclaimers.

Of course, we do not dispute at this late day the power of Congress to legislate in respect to interstate commerce, within constitutional limits. And we do not for a moment contend that any sacredness or immunity

is thrown around this information by the fact that the parties are corporations, rather than individuals; nor do we claim any immunity from testifying on the ground of hardship and inconvenience, or that the information sought is *private*, in the sense of being invested with any special privilege, above that which attaches to any man's right to attend to his own business, free from impertinent interference by unauthorized persons.

Perhaps, too, it will be found that the logic of our position casts a shadow of doubt upon the validity of some things which Congress has done or attempted to do, in pursuance of a certain tendency to "loose legislation" which was adverted to in the course of the argument below. As to this, we will only say that such instances, if any exist, will be found exceedingly few in number and unimportant in character, and that so far as our researches, or those of our opponents have disclosed, there is no law which our argument would invalidate, that has been sustained by any court, in the face of a challenge of the authority of Congress to enact it. On the contrary, there are several well-considered cases where the action of Congress has been attacked and overthrown on precisely the grounds which are here urged.

Having thus disclaimed certain positions which were imputed to us on the hearing below, it becomes necessary to repudiate certain disclaimers which are made on our behalf by the distinguished counsel for appellant in this court. He "assumes that it will not be denied" that "the obligation of the witnesses to appear and "answer the inquiries put to them was a legal duty." (Appellant's brief, page 7.) It would be pleasant if we could agree with him on this proposition, since much argument would thereby be saved; though even so, we

should still insist that the application to the Circuit court was properly dismissed. But we cannot so lightly pass over what appears to us one of the fundamental points in the case, viz: that there was no legal duty imposed upon the witnesses to answer these questions in this investigation.

## I.

OUR FIRST PROPOSITION THEN IS, THAT THIS INVESTIGATION WAS IN ITS NATURE JUDICIAL, AND AUTHORITY TO MAKE IT COULD NOT LAWFULLY BE CONFERRED BY CONGRESS UPON THE INTERSTATE COMMERCE COMMISSION, WHICH IS IN ITS NATURE AN ADMINISTRATIVE AND NOT A JUDICIAL BODY.

It is elementary law with this court that the Federal government is one of *delegated* and *divided* powers. In that its powers are delegated, it differs fundamentally from the government of a State, which has all the powers that have not been granted away, while the Federal government has only such as have been expressly conferred. In that its powers are divided, it differs not so much in kind as in degree from a State government, where the division is more or less strictly marked according to the circumstances of each case. But a most important difference grows out of the fact that these powers are *both* delegated *and* divided, and it is this, that in the State government all power which has not been expressly lodged somewhere else resides in the legislature, while the Federal Congress is just as much disabled from lodging the delegated powers where the constitution has not expressly provided that they might be lodged, as it is from attempting to exercise powers that have not been delegated at all.

Accordingly, when we find in the Federal Constitution the provision "the judicial power of the United States "shall be vested in one Supreme court, and such inferior "courts as Congress may, from time to time, ordain and "establish," we have the most express limitation upon the right of Congress to place any judicial power in any other body whatsoever. So it is said by KENT:

"The judicial power of the United States is in point of origin and title equal with the other powers of the Government, and is as exclusively vested in the courts created by or in pursuance of the constitution as the legislative power is vested in Congress, or the executive power in the president." 1 Kent's Com., 304.

Thus it has been decided that the Supreme court of the United States takes its grant of original (as distinguished from appellate) jurisdiction, not from Congress, but from the constitution, and that Congress has no authority to enlarge it.

*U. S.* v. *Ferreira*, 13 How., 45, and note.

The further limitation of the classes of cases falling within the cognizance of the federal judiciary will be discussed under the next head of our argument. Confining our thought now to the requirement that all judicial power of the federal government shall be exercised by the courts, and by them alone, we find in this provision a fatal obstacle to the present investigation.

## THE INTERSTATE COMMERCE COMMISSION IS AN ADMINISTRATIVE BODY.

This seems so clear as hardly to require argument. Whether Congress could create a judicial body charged with any or all of the duties that pertain to the Interstate Commerce Commission need not be considered, for

Congress has not undertaken so to do. The Interstate Commerce Commissioners are appointed for a term of years, and not during good behavior as the constitution requires for federal judges. This question received most thorough and careful examination by Mr. Justice JACKSON (then Circuit judge) sitting with District Judge BARR in *Kentucky Bridge Company* v. *Louisville & N. R. R. Company*, 37 Fed. Rep., 567, 612, *et seq.* We quote briefly from his opinion.

"In support of their position that judicial powers are conferred upon and exercised by the commission, counsel refer to various provisions of the act. * * * It is well settled that Congress in ordaining and establishing 'inferior courts' and prescribing their jurisdiction must confer upon the judges appointed to adminster them the constitutional tenure of office, that of holding 'during good behavior' before they can become invested with any portion of the judicial power of the government; and if the act to regulate interstate commerce, does in fact establish an inferior court, the commissioners appointed thereunder for certain fixed periods are clearly not such judges as can be invested with any portion of the judicial power of the United States, and their decision in matters affecting personal or property rights could have no force or validity. But does the Interstate Commerce Law undertake either to create an inferior court or to invest the commission appointed thereunder with judicial functions? We think not. While the commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the Act designates as a 'recommendation', 'report', 'order' or 'requirement' of the board, is neither final nor conclusive, nor is the commission invested with any authority to enforce its decision or award. * * *

We are clearly of the opinion that the commission is invested with only administrative powers of supervision and investigation, which fall far short of making the

board a court, or its action judicial in the proper sense of the term. * * * It is neither a federal court under the constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings."

## The Inquiry Which the Commission was Pursuing was Judicial.

We here come upon another of the easy assumptions of the distinguished counsel for the commission in this court. He asserts (appellant's brief, page 6) that "the "power to regulate commerce necessarily and confessedly "includes the power to provide *all means fairly adapted* "*to the complete exercise of the power.*"

This is a sufficiently accurate statement of the law if we insert one word, and make the sentence read "the "power to provide all *constitutional* means fairly adapted, "etc." It is not only in the form of words, but in the substance and logic of his argument that counsel has overlooked this important qualification.

But this is not the worst of it. He proceeds to assert that one of these means is the establishment of a national official body to "put into execution the princi- "ples and regulations declared by law, and in so doing "and as essentially and indispensably a part thereof, to "investigate the course and practice of interstate com- "merce as carried on by whomsoever engaged in it; *and* "*so to ascertain whether or not it is carried on according* "*to the requirements of law.*"

We assert, on the contrary, with entire confidence, that it is *not* one of the *constitutional* means included in the power to regulate interstate commerce, to delegate

to a non-judicial body the duty of inquiring whether such commerce "*is carried on according to the require-* "*ments of law.*" The proposition thus laid down by counsel is that *Congress may authorize compulsory inquiry by a non-judicial body for the purpose of discovering and punishing past violations of law.* A more startling proposition has seldom been asserted in this court. These violations are, if anything, *crimes*, punishable by heavy penalties of fine and imprisonment, and the investigation of the question whether crime has been committed is not an administrative act within any possible construction of the language. Such an inquiry is a function of the courts, with their historic appropriate machinery of the grand jury.

Judge COOLEY quotes with approval this statement of the test which distinguishes a judicial from a legislative act: "that the one is a determination of what the existing law is, in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions." And he adds, "Those inquiries, deliberations, orders and decrees which are peculiar to such determination (judicial) must in their nature be judicial acts. *Nor can they be both judicial and legislative;* because a marked difference exists between the employments of judicial and legislative tribunals. The former decide the general legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, these decisions should be founded. * * * Therefore to compare the claims of parties with the law of the land before established, is in its nature a judicial act; but to compose new rules for the regulation of new controversies is in its nature a legislative act, and *if these rules interfere with the past or the present, and do not look wholly to the future*, they violate the definition of a law as 'a rule of civil conduct.'"

Cooley Const. Lim., (5 ed.) 109, 110.

Judge Cooley cites with approval in this connection, *Commonwealth* v. *Jones*, 10 Bush., 725, where the Supreme court of Kentucky held that the legislature even of a state, could not empower election boards to decide whether a citizen by dueling has forfeited his right to vote or hold office, since that determination involves a judicial question. Authorities might be multiplied on this point, but we do not think it necessary.

That the inquiry in this case is judicial and only judicial, it seems impossible to doubt. We are at a loss to know how counsel expects to make it appear otherwise. Tried by any test with which we are familiar, the result is the same. The language of the order entered by the commission, and of the "informal complaints" on which that order was based, is susceptible of no other construction. The wrong complained of was that the Illinois Steel Company, by means of the "switching roads" as the device, was violating the provisions of the Interstate Commerce Act *by obtaining unjust preferences over other shippers.* The law makes one and only one provision in such a case, viz; the *punishment of the persons responsible for such violation.*

Counsel for appellant says:

"Punishment is not redress; the ascertainment of truth and consequent orders for just administration is regulation and redress. In the case of mere punishment the penalty may be paid and the evil still go on without cessation; in the other case, the truth being ascertained, the actual correction of the evil can be required and compelled."

This is almost a confession in terms of the point we are insisting upon, What is "redress"? Counsel seems to use the word in antithesis with "punishment," as if one related to the past and the other to the future. By any

accurate use of language this distinction cannot be maintained. Redress is defined, among other things as "relief," "remedy," "reparation," "indemnification." It does not come into play until there has first been an offence. We gather that counsel really means to use the word as the equivalent of "regulation," and to intimate the necessity, not only of punishing past offences, but of preventing their recurrence; in other words, the formation and enforcement of rules for future conduct. If this is what is meant, the very statement puts it beyond the power of the commission. "The ascertainment of truth" in the abstract is no part of the function of government at all. The ascertainment of truth *for the discovery and punishment of crime* is strictly judicial. "Orders for just "administration" (*i. e.* in the future) are legislative. In neither aspect does the inquiry fall within the functions of an administrative body like the Interstate Commerce Commission. That body has no power to prescribe "orders for just administration," nor can Congress devolve upon it any such powers.

Whether we look, therefore, at the prescription of duty, or at the enforcement of duty, we find no place for the operation of the commission in such an investigation as this.

We venture further to inquire what could have been the possible result of an investigation, except the discovery and punishment of violations of the law, if such there were? Let it be assumed that the answers of the witnesses and the production of the books demanded would have contradicted the other testimony given, and would have shown an unlawful participation by the Steel Company in interstate rates, what could the commission have done about it? Obviously nothing, except to present

the case to the grand jury, which is competent already, without any previous investigation by the commission, to investigate and act upon the precise question here supposed.

Carry this inquiry a little further. It is only by assuming the Steel Company's ownership of the switching roads, and the unlawfulness of such ownership, that the questions and the books are even pretended to be material. Suppose then that inquiry had developed the fact of such ownership, will it be pretended that the commission could have ordered the Steel Company to surrender its ownership; or to cease doing business with the roads which were lawfully chartered by the States of Illinois and Wisconsin; or that it could have commanded the railroad companies to emerge from the ownership of the Steel Company? It is not perceived how any of these results could have followed. If it be said that inquiry *might* have disclosed some new state of facts, unsuspected by the commission, the answer is two fold; 1st, such an inquiry would be purely and offensively inquisitorial, beyond the power of congress either to make for itself or to authorize any one else to make; 2d, all that can be conceived as the result of such inquiry is the discovery that in some way and by some device the Steel Company had been getting unlawful preferences. The commission, at the close of such an investigation, whatever the result, would have been shut up to one course, viz: prosecution in accordance with the constitutional forms of criminal law, by indictment and trial by grand and petit jury; and *the inquiry before the grand jury would be precisely the same as that which the commission is here conducting.* What constitutional warrant or what practical necessity there can be for thus duplicating the functions

of the grand jury, and entrusting them in the first instance to an irresponsible administrative commission, independent of all judicial control, we find it difficult to conceive.

It is obvious that no special sanctity attaches to the name, the number, or the personality of the body in which this power is attempted to be lodged. If Congress may authorize such inquiry by a Commission of five distinguished citizens appointed for a term of years, it may, under the same constitutional warrant, confer like power on a single individual for the entire country, or on a different individual for each state or county or railroad, or may attach it as a duty to an existing office, such as that of post-master or United States marshal. It may thus constitute an indefinite number of irresponsible citizens into detectives, armed with inquisitorial authority and a roving commission. For the safety and liberty of the citizen, Congress ought not to have any such power. It is gratifying to discover that wherever the question has been presented, the courts have decided that it has no such power.

A clearer or more emphatic statement could hardly be made, than has been made by the Inter State Commerce Commission itself on this precise point. We should almost be willing to submit this branch of the case upon the following extracts from the annual report of the commission for 1893 (pp. 6 *seq*):

"It must be evident upon reflection that the only effective mode of dealing with those discriminations between individuals which are effected by departure from the public rate is to place them in the category of criminal misdemeanors. Any redress by means of a civil action for damages is practically unavailing and manifestly inadequate. No argument is needed to show the insuffi-

ciency of private suits to protect dependent shippers against wrongs of this description; they can only be corrected by treating them as crimes. Such offenses are not mere evasions of a contract obligation; they are infringements of a public right and violations of a public duty. They are delinquencies to be restrained by punishment; not broken agreements to be made good by compensation. But when transgressions of this nature are made amenable to the criminal law, when the mandate of the statute has given them this penal character, they must be dealt with in the same manner as other punishable offenses.

The crime of rate cutting, for instance, as respects its detection and the method of bringing it to punishment, does not differ from other misdemeanors. *The ordinary machinery of the criminal law must be employed in enforcing the penal provisions of the act to regulate commerce, and there is no other way by which those provisions can be enforced.* The power of the statute in this direction was practically exhausted in creating the offense. When that was done, *when certain acts were declared misdemeanors, the subsequent perpetrators of those acts became at once liable to criminal prosecution in like manner and by the same agencies as other offenders. Nor can Congress provide any summary or exceptional methods for* PREVENTING OR PUNISHING *this class of transgressions.* The importance of uniform procedure in all criminal cases, and the constitutional right of trial by jury, preclude the creation of special tribunals having criminal jurisdiction of a particular class of offenses, yet differing in material respects from the criminal courts already established.

Theoretically, at least, the existing system of laws applicable to the wrongdoing now referred to is complete and ample. It is not lacking in strength or certainty. *The statute has characterized as misdemeanors all those discriminations between individuals by which favored persons secure transportation at less than the public rate; the parties to these transactions have incurred the prescribed penalties, and made themselves liable to indictment and conviction like other transgressors. If such offenses escape detection and punishment, it is not because of structu-*

*ral defect or weakness in the criminal machinery provided for that purpose*, but because those charged with the administration of the criminal law are unable or unwilling to enforce it against this class of offenders.

In this connection it should be observed that *the Commission created under the act to regulate commerce is wholly without authority as respects those discriminations between individuals which are made misdemeanors by that enactment.* True, the Commission is charged with the general duty of enforcing and executing the provisions of the act, but *it is endowed with none of the functions pertaining to the detection and punishment of delinquents*, except such functions as may be exercised by private citizens. It has no special means for discovering offenders and subjecting them to the disgrace of exposure, much less can it institute criminal proceedings, conduct trials of accused persons, or inflict penalties upon the convicted. But the main point to be considered is that *Congress has no power to clothe the Commission, or any similar tribunal, with authority to execute the penal provisions of this statute, other than to aid prosecuting officers in procuring evidence against suspected parties.*

The difficulty does not consist in determining what constitutes the criminal act, but in uncovering the guilty transaction and bringing to justice those who engage in it. *The offense is made penal by the terms of the statute; its discovery and punishment belong to the administration of the criminal law.* No amendment of this statute, thereof, is necessary or suitable with the view of giving greater power to the commission in enforcing its penal provisions. If immunity is secured from these demoralizing offenses, if the notorious and intolerable practices which the present law condemns are effectually dealt with, it will be through greater vigilance and more vigorous effort on the part of those who are charged with the duty of executing the criminal laws, aided, it may be, by enactments which tend to diminish the inducements to such transgressions.

To what extent it may be found feasible, under existing conditions, to prevent the commission of these misdemeanors is a matter for serious consideration. That the public tariff charges are frequently departed from in

particular localities, that rebates are paid, and that other prohibitions of the statute are disregarded is believed by many to be true.

The legal proof of these violations may not be obtainable, yet the fact of their occurrence is a moral certainity. How to check discriminations of this kind is a most perplexing inquiry."

If it be suggested that this investigation has a possible bearing on legislation, the answers are many and obvivious. The most obvious is involved in what we have already said, viz: that the inquiry, if it should result in proving all that is alleged, would not lay the foundation for any new legislation. If it is discovered that existing laws have been and are being violated, *the remedy is not to pass more laws, but to punish the violators.* If Congress conceives that any of the things which might be disclosed by this inquiry are undesirable, it will be no easier to pass a law against them because the Commission has discovered their actual existence in a given case.

It is also true that the commission, in the investigation in question, was not acting in pursuance of any specific direction of congress, or in aid of any pending, proposed or contemplated legislation. There was no Congress in session. There is always a general possibility of indefinite legislation on any subject within the jurisdiction of Congress, but that possibility does not warrant the disregard of private rights involved in a proceeding undertaken to ascertain facts which may be made the basis of a criminal prosecution, and to obtain an order from the commission which shall be *prima facie* evidence against the prisoner, if criminal prosecution shall be begun.

Turning from principle to authority, we find discussion practically foreclosed by the vigorous and decisive opin-

ion of Mr. Justice FIELD *in re Pacific R. R. Commission*, 32 Fed. Rep., 251. The act creating that commission conferred power in terms as broad and as plausible as those of section 12 of of the Interstate Commerce Act, directing an inquiry into the management of certain railroad companies and into the relations of the directors, officers and employes of said companies with other concerns having contracts with the companies under investigation, and also whether the companies, or their officers or agents had paid money or done anything else for the purpose of influencing legislation. These powers, like the powers attempted to be conferred on the Interstate Commerce Commission, contained two elements. Some of them were purely and offensively inquisitorial, searching into business which was wholly private. For the rest, the information sought could only be material as a foundation for subsequent judicial (*i. e.*, criminal) proceedings. In the first part of his opinion Mr. Justice FIELD, with great power and unanswerable logic, demonstrates that this is a judicial inquiry; that the commission is in no respect a judicial body, and that under our system of government such a body cannot conduct such an inquiry. He cites with suitable appreciation the monumental decision of this court by Mr. Justice MILLER in *Kilbourne* v. *Thompson*, 103 U. S., 168. Both opinions should be read in full, but an extract from each will here suffice. In the *Kilbourne* case Congress had undertaken by one of its committees to investigate the transactions of a so-called "real-estate pool," in order to discover, if possible, what interest Jay Cooke, who was a debtor to the United States, might have had therein. Justice MILLER says:

"We think it clear that the power asserted is judicial and not legislative." * * * "If the investigation

which the committee was directed to make was judicial in its character and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not * * * deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the constitution to the judicial and not to the legislative department of the government."

In the *Pacific R. R.* case Justice FIELD says:

"The Pacific Railway Commission, created under the act of Congress, is not a judicial body. It possesses no judicial powers. It can determine no rights of government, or of the companies whose affairs it investigates. * * * It is a mere board of inquiry, directed to obtain information upon certain matters, and report the result of its investigation to the President, who is to lay the same before Congress. * * *

[Congress in taking census] in its inquiries is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it cannot compel the production of the private books and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement the upon evidence those books and papers contain.

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely the protection of his person from assault, but exemption of his private affairs, books and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these

ways can they be obtained, and their contents made known, against the will of the owners.

"In the recent case of *Boyd* v. *U. S.*, 116 U. S., 616, the Supreme court held that a provision of a law of Congress, which authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or that the allegations of the attorney respecting them should be taken as confessed, was unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods. The court, speaking by Mr. Justice BRADLEY, said:

"'Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.'

"The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose. It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans.

"In his opinion in the celebrated case of *Entick* v. *Carrington*, reported at length in Howe State Tr. 1,029, Lord CAMDEN said:

"'Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet, where papers are removed and carried away, the secret nature of those goods will be an

aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.'"

"Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord Camden, said the Supreme court of the United States, 'affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the government and its employes, of the sanctity of man's home and the privacies of life.'" (*In re* Pacific Railroad Commission, 32 Fed. Rep., 651.)

Justice FIELD after citing the case of *Boyd* v. *U. S.*, 116 U. S., 616, which equally with the *Kilbourne* case (in his language), is "a bulwark against the invasion of the right of the citizen to protection in his private affairs," adds, "the courts are open to the United States as they are to the private citizen, and both can there secure by regular proceeding, ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws."

SAWYER, Circuit Judge, and SABIN, District Judge, concurred with Justice FIELD and filed separate opinions. From that of Judge SAWYER we extract a single paragraph.

"A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission, without any allegations, upon no fixed principles, and governed by no rules of law or evidence, and no restrictions except its own will or caprice, is unknown to our constitution and laws, and such an inquisition would be destructive

of the rights of the citizen and an intolerable tyrany. Let the power once be established and there is no knowing where the practice under it would end."

It appears in this record that, as in the *Pacific Railroad* case, the commission avowed its independence of all rules of evidence, and its right and purpose to conduct the examination without regard thereto. (Rec., 20, 22, 23.)

In the court below some stress was laid upon the so-called "visitorial power" of government. This argument is not reproduced on appeal, but it may be worth while to answer it very briefly. In any proper sense of the term the visitorial power can have no application to railroad companies at all.

"The power of visitation is a power applicable only to ecclesiastical and eleemosynary corporations. * * * The visitation of civil corporations is by the government itself, through the medium of the courts of justice."

2 Kent Com. (13 Ed.), 300.

"The visitorial power with us applies only to eleemosynary corporations. Civil corporations, whether public, as the corporations of towns and cities, or private, as bank, insurance, manufacturing and other companies of the like nature, are not subject to this species of visitation. They are subject to the general law of the land and amenable to the judicial tribunals for the exercise and the abuse of their powers. The way in which the courts exercise common law jurisdiction over all civil corporations, whether public or private, is by writ of *mandamus* and by information in the nature of *quo warranto*."

*Id.*, 305.

"The state has authority to interfere to ascertain whether or not the course pursued by a civil corporation is in excess of corporate power. This authority is asserted through the instrumentality of the courts, and

if it is found that a corporation is exercising franchises and functions not granted to it, the court may oust it from such exercise."

Waterman, Corp., 668.

"I much doubt whether the visitorial power exists at all, and in any case in this court, in the English sense of that power as emanating from the royal prerogative and founded on discretion. I should rather conclude that, under the constitutional administration of justice in this state, *all corporations, of whatever name or description, were amenable to the Supreme court, and to that court only, according to the course of the common law, for the non-user or misuser of their franchises.*"

KENT, C., *in A. G. v. Utica Ins. Co.*, 2 Johns. Chy., 371.

Moreover, even this quasi-visitorial power over civil corporations, which must be exercised through the courts according to the course of common law, clearly does not belong to every government in respect to every corporation, but only to the particular government which has chartered the corportion, or to which the corporation has consented to be amenable. It is competent for any sovereign in granting a charter to impose such conditions of visitation and inspection as it sees fit, and the charter, when accepted, is subject to these conditions. So the Federal Congress passed the National Bank law, and every bank organized thereunder consented to be subject to visitation and inspection by the bank examiners. So also many states have granted special charters, and passed general incorporation laws, reserving the right to alter, amend or repeal. In such cases the sovereignty which created, and which has the power to alter or repeal, may, from time to time, impose reasonable, or possibly even unreasonable restrictions and burdens of in-

spection upon corporations organized under its authority. But Congress stands in no relation whatever to the railroad companies concerned in this inquiry, *as corporations*. In so far as they are the instruments of interstate commerce, it may act upon them in pursuance of its control over that commerce; but it is a clear misuse of terms to call that visitation. It is a control that affects an individual carrier just as it does a corporation, and is no more "visitorial" than (for example) the power to prevent the obstruction of navigable waters.

It was said in the court below that Congress had passed a law which confers new franchises upon all roads doing inter-state business, and reference is made to section 5,258 United States Revised Statutes, authorizing all railroad companies to connect with roads in other states, etc. But it is difficult to see how Congress, by merely passing an act granting corporations a right which they already had, can, in the absence of *acceptance* by such corporations, claim any enlarged authority over them. There is no evidence before the court that any railroad company has accepted or taken advantage of this act, certainly not the Calumet and Blue Island or any other of the five switching roads.

With respect to state laws, it is only necessary to remember what we have already pointed out, that a state legislature has every power not specifically withheld. It is also true that so far as appears not one of these laws has ever been sustained against an attack upon its constitutionality.

## II.

EVEN IF CONGRESS COULD EMPOWER THE COMMISSION TO MAKE THIS INVESTIGATION, STILL IT COULD NOT EMPOWER THIS COURT TO GRANT THE ORDER APPLIED FOR; BECAUSE, WHETHER THE CHARACTER OF THE INQUIRY IS JUDICIAL OR NON-JUDICIAL, THE QUESTION DOES NOT HERE ARISE IN A CASE OR CONTROVERSY AS REQUIRED BY THE CONSTITUTION.

If this investigation by the Interstate Commerce Commission is other than judicial in its character, then by the very terms of its organization a judicial tribunal has no power over it. But that it is a judicial inquiry we have sufficiently shown by argument and authority. It remains to show that, as here presented, it is such an inquiry as does not fall within the constitutional province of this court.

The Federal Constitution provides that:

"The judicial power shall extend to all cases in law and equity arising under the constitntion, the laws of the United States and treaties made, or which shall be made under their authority, * * * to controversies to which the United States shall be a party, * * * etc."

The two clauses cited are the only ones under which, by any possible construction, the present application could fall. No power is granted except under the two categories of "cases" and "controversies." It was early decided, and has never been seriously questioned, that these words not only express, but limit the judicial power of the United States, and that only "cases" and "controversies" can find an entrance into the Federal courts. What these words mean, and how strictly they define the power of the Federal judiciary may be seen from a few citations. Justice FIELD in the case above cited says:

"The term 'controversies' if distinguishable at all from 'cases,' is in so that is less comprehensive than the latter, and includes only suits of a civil nature." (Citing *Chisholm* v. *Ga.*, 2 Dall., 432).

What, then, are "cases"? Judge STORY answers as follows:

"Another inquiry may be, what constitutes a *case* within the meaning of this clause? It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the constitution, laws and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the constitution, laws or treaties of the United States, it is within the judicial power confided to the Union."

Story, Const., § 1,646.

In *Osborne* v. *Bank of U. S.*, 5 Wheat., 745, Chief Justice MARSHALL says: "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

So, also, this court, by Mr. Justice FIELD, has compactly defined "cases and controversies" in the follow-

ing language: "By those terms are intended the claims or contentions of litigants, brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs."

*Smith* v. *Adams*, 130 U. S,, 173.

Light is thrown upon this subject also by the decisions as to what are *not* cases and controversies within the meaning of the constitution. A most interesting and instructive review of two or three critical cases on this subject is found in Justice FIELD's opinion in the *Pacific Ry. case*, at page 258.

The duty of examining the nature and extent of disability of invalid soldiers, and certifying the same to the Secretary of War for the guidance of his discretion in allowing or refusing pensions, was held by all the Circuit judges, except one, who did not have the question before him, to be a non-judicial duty, and the law imposing it upon the judges was held unconstitutional. *Hayburn's* case, 2 Dallas, 409.

Certain of the judges, agreeing that this was a non-judicial function, conceived that they might be justified in performing it as commissioners, outside of their judicial duties; but suit being brought to recover back pension money paid under an award made by the judges acting in this extra-constitutional capacity, these very judges concurred with the rest of the Supreme court in holding that their action was unauthorized, and that the money could be recovered back. *Todd's case*, 12 How., 52, note.

The examination of claims arising under the treaty with Spain for the cession of Florida, and certifying the same to the Secretary of State for allowance in his dis-

cretion, was held to be non-judicial and not a case or controversy within the constitution. *Ferreira's case*, 13 How., 45.

With these and a line of kindred authorities behind them, it is not strange that Justice FIELD and his associates in the *Pacific Railroad case* above cited, and Judge BENEDICT *in re McLean*, 32 Fed. Rep., 648, should have denied applications precisely similar in principle to the one at bar, on the ground that they were not cases or controversies within the meaning of the constitution. We may be pardoned for quoting once more and at some length from the *Pacific Railroad case*, because it argues the question more compactly and forcibly than we could do. It will be borne in mind that that, like this, was an application to the Federal court for an order upon witnesses to answer questions propounded by a congressional Commission, fully empowered by the language of the act of Congress to ask the questions and invoke the aid of the court.

Justice FIELD says:

"The court is not called upon to act in any judicial proceeding or investigation pending before it, or before any other court in the discharge of its judicial functions, or any matter ancillary to the exercise of its judicial functions. There is no case or controversy, at all, pending before it of which the proceeding attempted to be authorized is a part, or to which it is ancillary or in any way pertinent. It does not appear to us that it is contemplated by the act that the court, in the investigation provided for, when called upon to aid the commission, shall inquire beyond the point whether the question asked is within the scope of the broad field of inquiry prescribed. And so the commissioners claim, for they have conducted their investigation on that theory; and they insist that they are not bound by any rules of evidence or other principles of law observed by courts of justice, and by

which the latter are guided and controlled, in the ascertainment of facts in the course of ordinary judicial proceedings. If this be the correct view, the court is expected to compel an answer irrespective of any other considerations. Even questions criminating the witness are to be answered, the only protection to the party being that his answer shall not be used against him in a criminal prosecution—a protection of little avail to any party who should disclose criminal acts upon which an indictment could be found, and should upon compulsion indicate other sources of evidence, by means of which the acts disclosed can be proved; and such acts may also constitute offenses under the laws of the state, against which Congress can afford no immunity.

As bearing upon the power of Congress to compel an answer to criminating questions, or compel the production of private papers, see *Boyd* v. *U. S.*, 116 U. S., 616, The principles therein established are equally applicable to the matter now under consideration. The court seems, therefore, to be called upon to compel, under process for contempt, an answer to any question which the commission sees fit to ask within the scope of the inquiry attempted to be authorized by the act. If this be so, the court is simply made an instrument by this act, in the hands of the commission, to execute its unregulated and unrestricted will. The court is made the ministerial agent of the commission to perform its behests, whenever a witness refuses to respond to a question, or produce papers within the range of the authority attempted to be given by the statute. The judicial department of the government is simply made, by this act, an adjunct to the legislative department in the exercise of its political and legislative functions and powers, to execute its commands, and that, too, in a matter into which Congress, under the decision cited, has no jurisdiction whatever to inquire. I know of no power in Congress to thus render the judicial department subordinate or ancillary to the legislative and executive departments of the government, or to either of them. If there is any one proposition immutably established, I had supposed it to be, that the judiciary department is absolutely independent of the other departments of the government, that it can-

not be called upon to act a part subordinate to any other department of the government, or to a commission armed with exasperating inquisitorial powers over private affairs, unlimited by any consideration other than its own unregulated discretion. And so I understand the authorities to be. 'The functions of the judges of the courts of the United States are strictly and exclusively judicial. They cannot, therefore, be called upon to advise the president in any interpretation of law, or to act as commissioners in cases of pensions or other like proceedings.' 2 Story, Const., Sec. 1,777, and cases cited."

It will not do to say that this part of Justice FIELD's opinion is *obiter dictum*. He decides the case on two grounds; first, the lack of power in the court to grant the request, and second, the lack of power in the Commission to make the request. Logically, if either consideration renders the other unnecessary to the decision, it would seem that having reached the conclusion that the court had no power, because there was no case or controversy before it, the question of the power of Congress became irrelevant for want of jurisdiction to pass upon it. But in the light of common sense and a straightforward reading of the opinion, it will appear that the case was like one decided not long ago by the sagacious Baron BRAMWELL in England, who, coming to a second ground for his decision said, in substance: "It may be "said that having decided for the plaintiff on the "ground previously stated, it is unnecessary for me to "say anything about this. But by the same reasoning, "if I had mentioned this first, it would have been unne-"cessary for me to say anything about that. I wish it "understood that I decide against the defendant on both "grounds, one as much as the other."

Nor can the case be distinguished on the ground that the "duty" here asserted is one which congress had the

right to impose. The objection to the proceeding in both cases is, that the duty, if it exists at all, is a political, or legislative, and not a judicial duty; that the "case or controversy" is not pending in court, but elsewhere; and that "the judicial department of the "government is simply made an adjunct to the legislat- "ive department in the exercise of its political and leg- "islative functions and powers, to execute its com- "mands." The objection is not that the relief applied for is something the court has no power to *grant;* but that it is something the court has no power *either to grant or deny.*

The concurring opinions of Judges SAWYER and SABIN were to the same effect, and the decision is absolutely indistinguishable from the case at bar, as was conceded by government counsel in the Circuit court, who said the case was "*up to the hub*" against the present application.

So, in the *McLean case*, where the precise question involved here was presented, Judge BENEDICT said:

"It will be observed that the subpœna is not required for conducting an investigation into the facts of any case pending in this court or any other court. The request, (which is assumed to be in conformity with the statutes referred to in it) shows that the subpœna was desired for the purpose of enabling the bureau of pensions to make an examination into the facts bearing upon a certain claim for a pension pending in that bureau. To secure this end, the commissioner of pensions asks this court, by its process, to compel the person named to appear before a special examiner of the pension bureau, and there submit to an examination by such examiner, touching the claim referred to in the request. For such purpose the aid of this court cannot, in my opinion, be invoked. The pension bureau is not a court, nor can any officer thereof be vested with judicial functions. The proceeding, in aid

of which the process of this court is asked, is an executive examination pending in an executive department of the government, not a judicial inquiry pending before a court. In cases or controversies pending before the courts of the United States, those courts have power to compel the attendance of persons as witnesses, but, in my opinion, Congress is not authorized to permit that power to be invoked in aid of an executive examination pending in an executive department."

Most of the argument by which it was sought in the court below to meet this difficulty is abandoned in the brief filed here, and the substance of the contention, now urged in every form of reiterated statement, is that the act of Congress imposes upon all persons and corporations engaged in interstate commerce a "*duty*" to answer every question which the Commission may see fit to ask, and that when the Commission applied to the Circuit court for a summary order that the witnesses answer the questions, there was submitted to the court, in due form of law, the judicial question whether the duty existed and whether it ought to be performed.

This is in substance nothing more than another way of stating the proposition which was urgently pressed by government counsel in the Circuit court, who saw fit, however, to use the word "right" instead of "duty."

The proposition was there stated in the following terms:

"The government, or a public board representing the government, and seeking the information, is a party asserting the right on the one side, and the person of whom the information is sought is a party denying the right on the other side."

This obviously begs the whole question.

We may dispose in a word of the technical suggestion (Appellants brief, page 9) that "the parties complained

"of appeared in court and made formal answers to the "petition." The implication seems to be that because the Commission asserted a right on its part, or a duty on the part of the witnesses, and the latter denied it, that constituted a case; but one express ground of the denial is *that there is no case.* (See answers of witnesses, Record pages 21, 22, 23.) The argument is equivalent to saying that filing a plea denying the jurisdiction of the court admits jurisdiction.

In substance, the argument fails in at least three vital particulars: (*a*) as to the existence of the supposed duty; (*b*) as to the manner of its submission to the court; and (*c*) as to the method of enforcing it.

(*a*) As to the supposed duty.

It will be observed that counsel sagaciously refrains from pointing out the precise enactment which creates the alleged duty to answer these questions, and equally refrains from specifying the extent and limits of the duty itself. The word "duty" indeed, seems less felicitous than that employed by counsel in the Circuit court, viz: "right," since the latter is the word used in the Interstate Commerce Act itself. It is no merely technical distinction which counsel here overlooks. The language of the act does not make it the *duty* of any carrier or other person to furnish information, but simply confers *authority upon the Commission* to inquire into the management of the business of all common carriers subject to the provisions of the act, and makes it *the duty of the Commission* to keep itself informed as to the manner and method in which the same is conducted, and provides that the Commission "*shall have the right to obtain from*

*such common carriers* full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created."

In a matter involving at best an intrusion upon private rights, this language certainly will not be construed more broadly than its terms require. The argument now under consideration cannot be supported for a moment, except by assuming that when a "right" or "authority" was conferred upon the Commission, by implication a correlative duty was imposed not only upon common carriers but upon all other persons interested in interstate commerce; including in the present instance the Steel Company, which is not a common carrier at all.

This assumption will not bear scrutiny. It is at variance with all principles of interpretation.

That such a duty will not be implied is strikingly brought out in the recent decision of Judge RICKS in *United States* v. *Mitchell*, 58 Fed. Rep., 993. This was an indictment for refusing to furnish information required by the census laws. The language of the act was that the superintendent of census (not, as here, should "have the "right," but) "*is required to obtain* the information called "for and specified by the schedules, etc.;" and a heavy penalty of fine or imprisonment was provided for neglect or refusal to answer the questions. Judge RICKS, however, says:

"These several acts clearly indicate that it was the intent of the legislators to impose a duty upon the officers of corporations engaged in any productive industry to answer such questions as the schedules contain * * * but a careful examination of all the acts published impels me to the conclusion that *no such duty was imposed.* The act of July 6, 1892, [imposing penalty for refusal], was evidently based upon the assumption that the answers to inquiries 'herein required' were to be compul-

sory because of some duty imposed by some other section. The language in all the acts cited, clearly implies that in some other sections of the act, provisions were contained which required the corporations and firms named to answer the questions contained in the schedule. * * * But as before stated, no such duty was imposed by either of the acts. * * * Here the superintendent is 'required to obtain information from firms engaged in productive industries.' * * * But it may be said that congress manifestly intended to impose such duty, and that it is clearly implied from the law. But this is a criminal proceeding and to confer jurisdiction upon the Federal courts in such cases, an offense must be clearly defined and created by statute; we have no jurisdiction over any other offense (citing *U. S.* v. *Hudson*, 7 Cranch, 32; *U. S.* v. *Lancaster*, 2 McLean). *We cannot extend the law to cover a failure to do an act required to be done only by implication of law.*"

It is true this was a criminal case, but in principle it does not differ from the case at bar. If the duty asserted by the Commission to answer these questions exists, and is to be enforced in the manner desired by the Commission, it will be by prosecution for contempt; in technical form, a quasi-criminal proceeding, and in substance worse (because more summary) than indictment and trial by jury. A summary order of court for the performance of an alleged duty, subject to the penalties of contempt in case of failure, will not be entered upon an implication.

But even if it were held that there is an implied "duty" as broad as the "right" conferred by the act, that is not broad enough to cover the duty here insisted on.

If the duty exists it must be one that is expressly or by implication contained in and defined by the act of Congress. Thus it has been provided that railroad com-

panies should file their tariff schedules, and as counsel very truly says, no special remedy was provided for the failure to comply with that requirement, because the duty was specifically imposed, and "the common course of pro-"cedure in the courts in such case was clear and ade-"quate." But Congress could not invest the Commission with *discretionary power to create or not create a duty*. That is legislation, not administration.

Now, in the case at bar, the alleged specific duty arises, not out of the act of Congress, but out of the whim or caprice of the Commission. It is one which not only is not defined, but is incapable of definition, until the Commission has acted. It would be impossible for any carrier to know in advance whether he was or was not complying with the law and fulfilling his duty. It is of the essence of law that it should be stable and certain, not depending on caprice or whim. The only possible definition of the duty asserted by counsel for the Commission in this case is, that it consisted in furnishing to the Commission all books, papers and information which the Commission might see fit to ask for. This is simply arming the Commission with unlimited powers of inquisition. Under the guise of a duty it empowers the Commission to create as many separate duties as it sees fit, and the very act of creation is a legislative act. If Congress delegate power in these broad terms, it can delegate any power whatever.

The "right" of the Commission under the act is not to obtain any specific information, but "*full and complete in-*"*formation necessary to enable the Commission to perform* "*the duties and carry out the objects for which it was cre-ated.*" Who is to determine whether an answer to a given question, or the production of a given book, is or is not

"necessary to enable the Commission to perform its "duties?" The congress has not undertaken to determine it, as a legislative question, as it has done in reference to filing tariffs, etc. Nor is it submitted to the court for decision as a judicial question. The application to the court is not for a decision whether the information is necessary, but *for the enforcement of a duty which is assumed by the hypothesis to have been previously created.* It must then have been either *created* by the Commission, acting as a legislature, or *adjudged* by the Commission, acting as a court. Either hypothesis is fatal.

The situation may be expressed in a familiar logical formula.

When the Commission asks the question, either a duty to answer is thereby finally established or it is not. If it *is* finally established, then the act of the Commission is a legislative act, which is in the first place beyond the power of the Commission; but if valid, the court has no power to do anything except enforce it or punish its violation, without inquiry as to the materiality or necessity of the information sought. This makes the court the mere ministerial agent of the Commission.

If the duty is *not* established finally, but only provisionally, (*i. e.* subject to the court's inquiry as to its propriety and necessity,) then the court is called upon to take part in a legislative act, which is wholly beyond its competence; and what bears especially on the point now in hand, the supposed "case or controversy," consisting of the assertion on one side, and denial on the other, of an *established duty*, becomes a mere advisory inquiry whether it is lawful and expedient that *a duty shall be established.*

There is no escape from this dilemma by the assertion that the duty is created by the act of Congress, and that the Commission in asking the question is performing a mere ministerial function; for as we have seen the act defines neither the right nor the supposed duty corresponding thereto.

(*b.*) AS TO THE FORM AND MANNER OF SUBMISSION TO THE COURT.

It is ingeniously urged that the commission, having created these substantive duties by calling for answers to specific questions, may submit each of them to the court for enforcement, and that such submission, in the language of the learned counsel for the commission, "is "a case, and if disputed is a controversy."

This theory leads to some remarkable results. In the first place, it leaves out of sight the wholly auxiliary character of this so-called judicial proceeding, and treats the assertion of the duty to answer a specific question as if it were a matter which the commission has acted upon once for all, and submitted to the court for its final determination and disposition. It must not be forgotten that the controversy, so far as there is any, between the Interstate Commerce Commission on the one side and the carriers on the other is being conducted *elsewhere than in court.* Counsel has not seen fit to emphasize the provision of section 12 of the Interstate Commerce Act, under which this proceeding was taken, viz: that the commission "MAY INVOKE THE AID of any court of the "United States in requiring the attendance and testi- "mony of witnesses and the production of books, pa- "pers, documents, etc."

This application, therefore, is stamped from the outset with the marks of its purely ancillary character.

Further, it is only by splitting up the investigation into minute fragments that the Commission can find any part of it to submit to the court for judicial action. If it had been attempted to carry on this entire investigation in the first instance by petition to the court, it would not have been possible to pretend that it made a case or controversy of which the court could take cognizance. A part cannot be greater than the whole, and the Commission cannot set in motion the judicial power by dismembering their case and bringing a small fragment into court to be decided and returned to them for such use as they may choose to make of it.

Moreover, if each refusal of a witness to answer a question in such an investigation may be made the subject of a separate judicial inquiry, under the guise of enforcing a duty, there may be as many separate controversies as there are questions. It follows also that each controversy thus submitted to the court gives the right of appeal to the defeated party. Thus the extraordinary spectacle would be presented of this court or the Court of Appeals deciding in succession a series of objections to evidence, arising in a controversy carried on before another and non-judicial tribunal. It is a perversion alike of language and of thought to speak seriously of this as a proper method of judicial action.

We are at a loss to understand the assertion that this application is like the formal proceedings instituted in court for the enforcement of final orders of the Commission; and still more at a loss to see the analogy between this case and that of *Fong Yue Ting*, which is cited as bearing upon it. In order to make those cases applicable we must wholly overlook the incidental, intermediate, auxiliary and inconclusive position that the court is

asked to assume in this case, and must confound it with the final submission to the courts for enforcement of matters which in the one case have been finally passed upon by the Commission to the extent of its power, and in the other case have been finally acted upon by the legislative power, which alone can deal with purely political questions. In the *Kentucky Bridge* case and other cases of attempted enforcement in court of the orders of the Commission, the whole subject has been dealt with by the Commission from the administrative side. Its conclusions have been formulated, and application is made, not by summary petition, but in the ordinary forms of law, for mandamus or injunction as the case may be. In the Chinese cases it had been determined by the political or legislative power that a certain class of persons should not be allowed to remain in the country. It was an obvious exercise of judicial power to determine the question of fact, whether defendants fell within the forbidden class, and incidentally, of course, to determine the validity of the law itself.

The citation of the *Passavant* case, and other customs cases, discloses the same forgetfulness of fundamental differences. The determination of the custom appraisers as to value of imported merchandise, was by statute made final and conclusive—a power upheld by the courts as incident to the sovereign power of collecting revenues. An appeal was given to the courts on questions of the *construction of the law;* but only after the appraisers had finally acted upon the case; not as auxiliary to their deliberations.

In referring to this case, counsel seems dimly to imply what was asserted at length, though with no great distinctness of thought, in the court below, that the pro-

ceeding may be sustained under some supposed jurisdiction "in aid of the administrative department." We say with no great distinctness, since we were left in doubt whether the contention was that a proceeding which otherwise would not be of judicial cognizance, becomes a "case" when brought in aid of the executive; or, on the other hand, that the judicial power extends to something besides "cases and controversies," if only the executive department invokes its aid. In neither aspect does this suggestion bear the test of critical examination. It is an attempt to give authority where the constitution has not given it, and this not as an implied power, incidental to the exercise of those granted, but as a kind of constitutional *tertium quid*, a nondescript authority, not expressed in the constitution, but evolved out of the supposed logical necessity of the case.

The courts have uniformly and repeatedly refused to recognize as "cases or controversies" questions arising at a preliminary stage before the judicial power is called into exercise, or subject to revision by another department after the courts have done with them. Under the first head falls *U. S.* v. *Ritchie*, 17 How., 525. The language of the act creating the California Land Claims Commission seems to be framed with a studious purpose of making the Commission an adjunct of the court, and provides *eo nomine* an "appeal" from its decision. This court decided that the Commission could only be supported at all by treating it as a purely administrative body, and that the so-called "appeal" was, in legal effect, the institution of a new suit, the judicial power being then for the first time invoked.

It will be noticed that this case did not involve the question of the right of such a Commission to call the

court in aid of its investigation, for the law contains no such provision. Nor did it involve the question of the character of a proceeding where the action of the court was preliminary to, or (as here) interjected between, the discretionary action of other departments of government. These questions are amply covered by cases above cited with others. Thus in *Hayburn's case*, 2 Dall., 409, as has been indicated, the finding and certificate of the court were to be laid before the Secretary of the Treasury, and to be final if approved by him, but if he disapproved the matter was to be brought before Congress for its discretionary action. The court held that this took the matter out of the category of cases falling within the judicial cognizance.

In *Ferreira's case*, 13 How., 45, the proceeding was held not to be a constitutional "case," because there was a similar discretion lodged in the Secretary of State after the court should have rendered its decision upon the validity of any given claim.

The precise objection here urged was recognized by Mr. Justice GRAY, now of the United States Supreme court, speaking as chief justice for the Supreme court of Massachusetts, in the case of *Supervisors of Elections*, 114 Mass., 247. The Massachusetts constitution defined and limited very strictly the division of powers between the legislative, executive and judicial departments. It was held by the Supreme court that an act of the legislature, requiring the court on petition to appoint supervisors of election, was unconstitutional, as imposing non-judicial duties upon the court. Judge GRAY says:

"These supervisors, although entrusted with certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the

court or any judge thereof. *Their duties relate to no judicial suit or proceeding.* * * * We are unanimously of the opinion that the power of appointing such officers cannot be conferred upon the justices of this court without violating the constitution of the commonwealth. We cannot exercise this power as judges, because it is not a judicial function, nor as commissioners, because the constitution does not allow us to hold any such office."

This decision is not weakened in any way by the acts of Congress authorizing the federal judges to appoint supervisors of election. The grounds of distinction pointed out by Judge GRAY are unnecessary to be considered, since the federal constitution, article 2, section 2, clause 2 expressly authorizes Congress to "vest the appointment of such inferior officers as they shall think proper, "in the president alone, *in the courts of law*, or in the "heads of departments." It is held by this court, in *ex parte Seibold*, 100 U. S., 399, that the appointment of federal supervisors by the courts is warranted by this clause of the constitution. The reasoning of Judge GRAY in the Massachusetts case is strictly applicable here.

Thus it will be seen that the decisions of the most eminent courts amply sustain Judge FIELD and his associates in the *Pacific Railway* case, and Judge BENEDICT in *McLean's* case in holding that the Federal courts cannot be made the instrument of the executive department in a merely auxiliary proceeding. Here, as in those cases, the application before the court is not a part of a judicial proceeding, and the order, if made, would adjudicate nothing. It would not even bind the Interstate Commission, but it would be discretionary with that Commission to use or ignore the information sought to be obtained.

When a "case or controversy" once gets into court,

it is there to stay, until it is finally disposed of; not to be bandied back and forth between the departments at their pleasure.

We come back finally to the proposition, which counsel does not state in terms, but which is involved in all of his argument, that *any* petition to a court, however non-judicial in form, asserting a right, however non-judicial in character, on one side, and an answer denying the right on the other, constitutes a case or controversy, even though, as here, the denial is based upon the ground that there *is* no case or controversy. But if every unfounded assertion of a right, in a non-judicial form, could make a "case," the whole constitutional limitation would be meaningless and void. This will readily appear if we leave out of sight for a moment the congressional authority on which the asserted right is here supposed to be based, and test the question as between private parties. A duty imposed by Congress has no higher sanctity than the obligations of a private contract. Suppose, then, that some years ago a private individual had filed a petition, setting up that by contract a senator of the United States, upon good consideration, had agreed to make known to the petitioner the reasons which influenced the senator to support the Compromise of 1850, which agreement the senator was now refusing to perform, and praying that performance be ordered by summary process, subject to the pains and penalties of contempt; and that the senator, being served with process or notice, had come into court and denied that the subject-matter of the application was a case or controversy within the constitution. The situation would be in legal effect precisely what is said to exist in the case at bar—the right of petitioner to have the information asserted on the one side and denied on the other.

Does this make a case of judicial cognizance? Obviously not, for the reason that the court, looking into the subject-matter of the application, discovers that it is *of a non-judicial character*. But the right of the court to examine into the nature of the subject-matter is fatal to the argument in question. If a right, asserted on the one side and denied on the other, is judicial or otherwise *according to the nature of the right*, then it is idle to argue that the assertion and denial alone make a constitutional "case."

That the court will look at the nature of the right, and not merely at the form in which it is asserted, to determine whether there is or is not a "case" for judicial consideration, is abundantly settled by authority.

Thus, in *Murray's Lessee* v. *Hoboken Land Co.*, 18 How., 282–284, Judge CURTIS speaks the mind of the court as follows:

"In short, the argument is, that if this were not, in its nature, a judicial controversy, Congress could not have conferred on the District court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the District court to pass upon it, is conclusive evidence that it is a judicial controversy.

We cannot admit the correctness of the last position. If we were of opinion that *this subject-matter cannot be the subject of a judicial controversy*, and that consequently it cannot be made a subject of judicial cognizance, *the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual.* * * *

We do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; *nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.*"

In *Ferreira's* case, 13 How., 45 (already cited in another connection), there was a studious attempt to give the matter the aspect of a case within the meaning of the constitution. Chief Justice TANEY, at page 49, says:

"It would seem that the district judge acted under the erroneous opinion that he was exercising judicial power, strictly speaking, under the constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant, and the judge states in his opinion that the district attorney appeared for the United States and argued the case, and prayed an appeal. But the acts of congress required no petition. * * * The district attorney had no right to enter an appearance for the United States so as to make them a party to the proceeding, and to authorize a judgment against them. * * * *The acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one*, nor to bring appeal from his award before this court."

We think it sufficiently appears from the decisions, that the existence of a "case or controversy" is to be determined by the court on considerations both of form and substance. If there be a defect of judicial quality in the substance of the proceeding, then no amount of legal form can bring it within the judicial power. Conversely, it seems to be true, within certain broad limits, that, even if the substance of the matter be of judicial cognizance, still, unless asserted according to the forms of law, it is not a case or controversy under the constitution. If a litigant, with however meritorious a case, should attempt to enforce his rights in this court by wager of battle, we suspect it would very promptly be discovered that such is not a "case or controversy" in the constitutional sense. On the other hand, we find it impossible

to believe that the court would entertain jurisdiction of a petition for mandamus, however formally correct, to enforce some asserted right of a clearly non-judicial character; as, for example, to compel the performance of the Fifth symphony of Beethoven, instead of the Seventh, at an approaching concert; although mandamus, when properly brought with reference to a suitable subject-matter, is always held to be a "case." The latter phase of the question does not call for discussion here, and perhaps it is not likely ever to arise, since any such petition would necessarily be open to demurrer, and would thus be disposed of in the same practical way as if dismissed for want of jurisdiction.

So far as the case at bar is concerned, we insist that it is fatally defective, both as to substance and form, and can by no possibility gain any standing in a Federal court.

The acts of Congress relating to the extradition of criminals under treaties with foreign powers, in no way militate against the position here taken. The duties prescribed there are not, in any sense, devolved upon the court as such. It is not provided, as it is in the statute relating to the appointment of Federal Election Supervisors, that the *court* shall be convened, but the power is distinctly conferred upon the *person* and not upon the court. No provision is made for any order to be entered on the records of the court, or for the services of any of the court officers, and the power is conferred in express terms upon persons, who by no possibility can be brought within the category of judicial officers, such, as, for example, commissioners, and still more conclusively, judges of state courts, over whom, as such, the Federal Government has not a shadow of authority. There may be

room for question, under the decision in *Todd's* case above referred to, whether a federal judge can lawfully exercise this non-judicial power, but there certainly is no room for the contention that Congress has conferred upon the courts that which has been so often held to be outside their judicial functions. If such were the effect of the legislation, we can only say, as this court said in 18 How., *supra*, it would be clearly unconstitutional and void. The latter remark applies also to the statutes relating to Letters Rogatory.

It seems to be conceded that this court cannot be called upon, as a matter of right, to enforce without inquiry whatever order the Commission may see fit to make. This contention, as we have shown, was pressed upon Judge JACKSON in the case in 37 Fed. Rep., but it received no encouragement from him, and so far as we know, has not been revived since he put it at rest.

(*c.*) AS TO THE METHOD OF ENFORCING THE ORDER OF COURT.

It is obvious that if this case is of judicial cognizance, the application of the commission must be granted, if at all, in the form of a summary order to answer the questions or produce the papers, and the only way of enforcing this order is by process of contempt. The application is, in short, as we have sufficiently shown, an *attempt to borrow the process of contempt for use in an administrative inquiry*, and it has no other substantial purpose.

At this point we find another of the remarkable assumptions of counsel. He says:

"It is the province of the legislative and not of the judicial power to say what the form of procedure and remedy shall be in every case of an officer or person who

has refused to do that which a valid law has required him to do, *subject, of course, to the provisions requiring jury trial, etc., not applicable here.*"

Why not applicable here? It has been decided, not once but a hundred times, that the right of trial by jury as guaranteed by the constitution forbids the creation of new methods of precedure in cases involving private rights.

*Scott* v. *Neely*, 140 U. S., 106.

It has been expressly decided by the Supreme court of Illinois that an act authorizing a Circuit court to punish summarily by fine and imprisonment a person who shall refuse to obey the subpoena of a notary public to appear and have his deposition taken, is unconstitutional and void, as depriving the party of the right to trial by jury. The court says:

"No one would pretend that it is competent for the general assembly to enact that the crimes and misdemeanors enumerated in the criminal code shall hereafter be contempts of court and summarily punished as such, and thus deny to the parties accused the right of trial by jury; and this for the plain reason that the general assembly cannot deny to individuals the guaranteed right of the constitution by simply changing the names of things."

*Puterbaugh* v. *Smith*, 131 Ill., 199.

But leaving out of consideration the question of jury trial, we insist that

THE JUDICIAL PROCESS OF CONTEMPT IS NOT A LEGITIMATE METHOD FOR THE ENFORCEMENT OF EXECUTIVE OR LEGISLATIVE COMMAND.

It may be unnecessary to point out that disobedience of an order of the Interstate Commerce Commission does not, of itself, constitute a contempt of that body, nor is it within the competency of Congress to make

such disobedience punishable by contempt proceedings on the part of the Commission. The power to punish contempts which belongs to Congress exists only while that body is in session, and is in its nature incapable of being delegated to any other authority which Congress may erect. (*Kilbourne* v. *Thompson*, 103 U. S., 168; *Langenberg* v. *Decker*, Supreme court of Indiana, 31 N. E. Rep., 191, 195.)

We do not understand that these propositions are questioned by counsel for the Commission. On the contrary, the very provision of the statute which requires the "*aid*" of the Federal court to procure the application of its compulsory process, is an express recognition by Congress of its own inability to clothe the Commission with that power.

What cannot be done directly, however, it has been sought to do indirectly. No legislative or executive power can authorize punishment as in cases of contempt, for disobedience of executive or legislative order, in such case as that before this court, and it is apparently because of this constitutional prohibition that the claim is made of a right in these two branches of government to supplement their own powers by recourse to the peculiar powers of the judiciary. By this proceeding, a new constitutional law is developed, under which it is possible to escape the limitations imposed upon the judiciary, by trusting the investigation of criminal cases to executive or legislative commission, and excluding the judicial department of the government from all authority and control over the progress of this investigation; while, at the same time, it is sought to avoid the limitations which are imposed upon the executive and legislative departments for the

protection of the individual citizen, by borrowing from the judicial department its compulsory process for the enforcement of orders made in the course of that investigation.

It would be difficult, perhaps, to find any case which would illustrate more strongly the truth of Montesquieu's statement, repeated by Mr. Hamilton in the Federalist, No. 78, that "there is no liberty if the power of judging "be not separated from the legislative and executive "departments."

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department, and no other."

*Kilbourne* v. *Thompson*, 103 U. S., 168, 190.

In approaching the specific instance in which it is sought to disregard the line which separates the judicial power from the executive and legislative branches of government, we find that the effort which is made by the executive in this case is no new effort, but is one which has found its counterpart in the very early days of the common law.

The power to arrest and punish for contempt, it has

been said, is the highest exercise of *judicial power*, and belongs to the judges of courts of record or Superior courts. (*Langenberg* v. *Decker*, 31 N. E. Rep., 190, 194.)

The exercise of this power by summary attachment proceedings is as old as the common law. It antedates in the common law all constitutions and all statutes, even that of the Magna Charta. BLACKSTONE says:

"We find it exercised as early as the annals of our law extend, and, though a very learned author seems inclined to derive this process from the statute of Westm., 2, * * * yet he afterwards more justly concludes that it is a part of the law of the land, and, as such, is confirmed by the statute of Magna Charta."

Book 4, Hammond's Bl. Comm. p, 365.

Both the right to punish contempts and the power to proceed in a summary manner are essential to the performance of the very functions for which courts are created. The learned author just mentioned declares that they "result from the principles of judicial establishments, "and must be an inseparable attendant upon every su- "perior tribunal." But if the proceedings for contempt could only be instituted by indictment or information, and if the accused were entitled to a trial by jury, it is obvious that great difficulty and delay would be occasioned in the transaction of ordinary judicial business, and the wise purpose of the power would in many instances be defeated. The framers of our constitution never intended to thus interfere with the due and orderly administration of justice. It was not their purpose to have the procedure designated in the sections mentioned cover contempts of court, and thus give this class of offenses a *status* theretofore unknown in either the statutory or the

common law. The constitutional guaranties apply to such acts as constitute violations of public and general laws. They leave contempts which are simply acts in disobedience of judicial mandates or process, or which tend to obstruct the dignified and effective administration of justice, to be dealt with in the summary manner theretofore universally followed. (See *Wyatt* v. *The People*, 28 Pac. Rep., 961, 963.)

The advantage which such a process as this can offer to the executive for the enforcement of its commands over the slower process established by the Constitution, is at once apparent, and consists in the fact that by it is offered a means for the evasion of the constitutional rights of trial by jury and security against unreasonable searches and seizures.

These possibilities of advantage began to be felt as soon as the constitutional guaranties which secure what Blackstone terms the absolute rights of every Englishman, found place in English constitutional law.

As early as the year 1410, we find Henry IV endeavoring to avoid the necessity of trial by jury for the enforcement of his royal commands, applying to Chief Justice Gascoigne for a summary order of punishment from the court.

Campbell's Lives of Chief Justices, Vol 1, p. 128.

As late as the last enactment on this subject by the Congress of a free republic, we find the same effort to escape constitutional limitations by direct appeal to the compulsory process of the court. And, during all this time, whenever the question has been presented, whenever the right has been challenged, whether under the

English or the American constitution, the judicial answer has always been the same, that the compulsory process of a court, which belongs to it because it *is* a court, and is one essential part of any body whose judicial function it is to hear and to determine—that compulsory process such as this is incapable of separation from the judicial act of decision, and cannot be loaned to any other body to enforce its decrees.

## III.

### AS TO MATERIALITY OF THE EVIDENCE DEMANDED.

It is a somewhat singular position which counsel takes as to the subjects of inquiry that are open before this court. He intimates, on the authority of the *Passavant* case, that only the question of jurisdiction can be here considered. *No question of any kind was certified* to this court by the Circuit court, and if this court has jurisdiction of the appeal at all, we suppose it to be as true here as elsewhere that the judgment will be affirmed if it was a right judgment, even though the court may have given a wrong reason for it. The opinion of the court below is instructive, but not controlling.

We are really very little concerned either to establish the jurisdiction of this court over the appeal, or to insist on the decision by this court of any of the questions involved. It is not our appeal; we are entirely satisfied with the decision below. Somewhere, and at some stage of the proceeding, if it goes on, these witnesses will have a right to the decision of a competent court upon the materiality of the evidence called for, and all the indications are that this proceeding, if it has any future history, will find its ultimate review in this court.

We have no desire, however, to spend unnecessary words about it, and think it can be disposed of in a very small compass.

There seems to have been a change of position on this point since the investigation was begun. It undoubtedly was the view of the Commission that the court was bound on this application to order the witnesses to answer all questions which the Commission might see fit to ask, without inquiry as to their materiality. It also was clearly the opinion of the Commission, as is alleged in the answers filed by the witnesses, and shown by the extracts from the record read at the hearing, that the evidence was not to be limited by the rules of law, but that hearsay, suspicions, and opinions would be admitted and considered. Both these views have been clearly modified in the argument as presented. With respect to the latter point it seems to be conceded by the government counsel that only such evidence could be called for by the Commission as would be admissible on a trial of a case in court. The utmost that could be claimed with any plausibility is, that any question within the general scope of the inquiry should be deemed material. This, was, no doubt, the meaning of one of the government counsel, who insisted on the oral argument below that it was for the Commission, as he put it, " in the first " instance " to determine whether the questions were material, and seemed to infer from this that such determination was conclusive upon the court.

The inference is a *non sequitur*; the right to determine " in the first instance," of itself implies that at a later stage the decision rests not with the Commission, nor with the witness (as the government hinted that we contend), but with the court. Moreover, the general scope of the inquiry is not broad enough to cover the owner-

ship of stock in these companies, except so far as that may have some perceptible bearing on the question of illegal rates; and if it appears that no possible state of facts about the stock could make out a case of illegal rates, the question cannot be justified under such a general phrase.

On the other point, it is admitted in the brief for the government that the court cannot be called upon to enforce any "arbitrary, capricious, inquisitorial and oppres-"sive proceedings," and the counsel themselves, in the court below, cited *Doherty's case*, 27 Fed. Rep., 730, where, in an action for a statutory penalty for refusing to answer a question in a revenue case, the court expressly held that no penalty had been incurred, for the reason that the question which the witness refused to answer was not a pertinent, *i. e.*, a material question. It remains, therefore, that the questions propounded by the Commission must be both reasonable and pertinent, and also that the court is to determine on this application both the reasonableness and pertinency thereof. Of course on our part it is conceded that the *weight* of evidence is not to be considered on this application, but only its *tendency* to prove material matters.

The question, then, is to be tested as it would be tested in an ordinary trial. The issue was whether the Illinois Steel Company had organized and was operating the five switching roads as a device for evading the interstate commerce law. Full inquiry was made, and it was developed by the testimony of every witness examined that there was no special or illegal arrangement by which the Steel Company received any benefit whatever in respect to freight rates through the medium of the switching roads. There was not a syllable of evidence tending in the most remote way to prove the existence of any

violation of the law. It was not hinted that the Commission expected to develop further evidence on this subject. It seems to us clear beyond all possible controversy that in a suit at law or equity, with the record in the condition we have described, an inquiry as to the ownership of the stock in the switching roads or the Steel Company would have been promptly excluded as immaterial.

It needs no argument to show that the mere ownership of the stock in the switching roads by the Steel Company would not constitute a violation of the inter-state commerce law. (*Pullman Car Co.* v. *Missouri Pac. Co.*, 115 U. S., 587.) If such ownership were illegal under the laws of Illinois, that is a matter with which neither the Inter-State Commerce Commission nor the federal courts have any manner of concern. How the ownership of the Illinois Steel Company's stock could by any possibility be deemed material as the record stood, passes our comprehension. The truth is, that the commission was obviously engaged in "fishing," and these questions can not be made pertinent to anything except to the vaguely possible results of such a piscatorial enterprise. It is precisely that class of investigations that are prohibited by the law of the land as laid down in the *Boyd* case, the *Kilbourn* case, the *Pacific Railway Commission* case, and other "bulwarks of private liberty."

Whether, therefore, the question be examined with reference to the general powers of the Commission or of the court, or to the propriety of the questions asked in this particular case, the conclusion must be that the application of the Commission was properly denied.

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